TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 217.

THOMAS TINDLE AND WILLIS K. JACKSON, PLAINTIFFS IN ERROR,

vs.

CLARENCE T. BIRKETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 9, 1906.

(20,120.)

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a STATE OF NEW YORK:

Court of Appeals.

THOMAS TINDLE and WILLIS K. JACKSON, Respondents,
vs.
CLARENCE T. BIRKETT, Appellant.

Appeal Book.

Gibbons & Pottle, Attorneys for Respondents, Buffalo, N. Y.
Thomas Carmody, Attorney for Appellant, Penn Yan, N. Y.

1 Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs,
against
CALVIN RUSSELL and CLARENCE T. BIRKETT, Defendants.

The plaintiffs above named, by Gibbons & Pottle, their attorneys, complain of the defendants, and allege:

First.

For a first and separate cause of action against the said defendants, these plaintiffs allege:

That the plaintiffs now are, and at all times hereinafter named were, co-partners in trade under the firm name or style of Tindle & Jackson, and, upon information and belief, that the defendants were, at the times hereinafter named, co-partners in trade, under the firm name or style of Russell & Birkett.

The plaintiffs further allege, upon their knowledge, that heretofore, and on or about the 30th day of November, 1898, the defendants, as such co-partners, requested to purchase from the plaintiffs certain goods, wares and merchandise known as a carload of barrel hoops, which were of the value of three hundred and forty-nine dollars and thirty cents ($349.30). The plaintiffs further allege, upon information and belief, that in order to induce the plaintiffs to sell the said goods to the said defendants, the said defendants falsely and fraudulently stated and represented to the plaintiffs that their assets were equal to the sum of one hundred and ninety-
2 five thousand, eight hundred and nineteen dollars and forty-seven cents ($195,819.47,) including real estate consisting of flour mills and equipments, warehouse, etc., of the value of one hundred and thirteen thousand dollars ($113,000,) and that their only liabilities consisted of forty-two thousand, nine hundred and sixty-one dollars and twenty-five cents ($42,961.25), made up of open accounts on ledger to the amount of thirteen hundred and ninety dollars and sixty cents ($1,390.60), mortgages on real estate, twenty-seven thousand dollars ($27,000) bills payable due banks,

thirteen thousand, six hundred and fifty dollars ($13,650), and other liabilities, nine hundred and twenty dollars and sixty-five cents ($920.65), and that their net worth, over and above all liabilities, was one hundred and fifty-two thousand, eight hundred and fifty-eight dollars and twenty-two cents ($152,858.22), and that their business was large, increasing and profitable.

The plaintiffs further allege, upon information and belief, that, in fact, the business of the said defendants was not profitable, but was, and had been for some years, unprofitable, and carried on at a loss, and that the real estate referred to in said statement as being worth one hundred and thirteen thousand dollars ($113,000), was not worth to exceed the sum of eighty-five thousand dollars ($85,000), and that, in addition to the debts and liabilities stated by them at that time, they owed one Roselle Russell, for borrowed money, to the amount of about twenty-six thousand, one hundred and twenty dollars and forty-seven cents ($26,120.47), and one Cora Russell, for borrowed money, about the sum of four thousand and ten dollars and ten cents ($4,010.10), and one Mabel Russell about the sum of fourteen hundred and eight dollars and seven cents ($1,408.07), and one Henry Russell a sum exceeding ten
3 thousand dollars ($10,000), and that, in addition to the encumbrances upon their real estate, amounting to twenty-seven thousand dollars ($27,000), there was a further encumbrance upon said real estate, in the shape of a mortgage to secure the payment of certain bonds, to the amount of ninety-five thousand dollars ($95,000), which mortgage was then unrecorded. That, instead of having a net worth of one hundred and fifty-two thousand, eight hundred and fifty-eight dollars and twenty-two cents ($152,858.22), the said defendants were not, in fact, worth anything over and above their debts and liabilities, but that their said debts and liabilities exceeded in amount the value of all property owned by them.

That plaintiffs further allege, upon information and belief, that such statements, and each of them, were made with the intent to deceive the plaintiffs, and to induce them to part with the possession of said property, and were false and untrue, and were known to be false and untrue by the defendants at that time. That the plaintiffs relied upon such statements and representations, and believed each of them to be true, and that, by reason of such representations, and by reason of such reliance and belief, the said plaintiffs did sell and deliver to the said defendants said merchandise, and that the plaintiffs were injured and damaged thereby in the sum of three hundred and fifty-nine dollars and forty cents ($359.40), being the value of the property delivered to the said defendants in reliance upon such representations, and the said defendants being wholly and absolutely insolvent, and the said property having been disposed of by the said defendants before the plaintiffs became informed of the fraud practiced upon them.

Second.

For a second and further cause of action against the said
4 defendants, these plaintiffs allege, incorporating herein so much of the first count hereof as refers to the co-partnership

of the plaintiffs and the co-partnership of the defendants and the false and fraudulent representations made to the plaintiffs by the defendants on or about November 30, 1898, and, in that behalf, further allege that the said representations, referred to in said first count, were again made to the said plaintiffs on the 24th day of January, 1899, at which time the said defendants again requested the said plaintiffs to sell and deliver to them certain other goods, wares and merchandise, consisting of a carload of flour barrel staves, of the value of two hundred and thirty dollars and eighty-three cents ($230.83), and the plaintiffs further incorporate herein all of the said first count hereof which refers to the said representations made on said date, the falsity thereof, and the reliance thereon by the plaintiffs, and the intent of the defendants to deceive the plaintiffs, and, further, in that behalf, allege that, in reliance upon such representations, the said plaintiffs did sell and deliver to the said defendants said goods, wares and merchandise, of the value of said sum of two hundred and thirty dollars and eighty-three cents ($230.83), and that the said defendants disposed of the same to their own use, and became wholly insolvent and bankrupt before the plaintiffs discovered the fraud that had been practiced upon them. That the plaintiffs have suffered damage by reason thereof in the sum of two hundred and thirty dollars and eighty-three cents ($230.83).

Third.

For a third and further cause of action against the said defendants, these plaintiffs allege incorporating herein so much of the first count hereof as refers to the co-partnership of the plaintiffs and the co-partnership of the defendants, and the false and fraudulent representations made to the plaintiffs by the defendants on or about November 30, 1899, and, in that behalf further allege that the said representations referred to in said first count were again made to the said plaintiffs on the 25th day of March, 1899, at which time the said defendants again requested the said plaintiffs to sell and deliver to them certain other goods, wares and merchandise consisting of three-fourths of a carload of kiln-dried staves and one-fourth of a carload of fruit-barrel staves of the value of three hundred and twenty-one dollars and seventy-three cents ($321.73).

The plaintiffs further incorporate herein all of the said first count hereof which refers to the said representations made on said date, the falsity thereof, and the reliance thereon by the plaintiffs, and the intent of the defendants to deceive the plaintiffs, and, further, in that behalf, allege that, in reliance upon such representations, the said plaintiffs did sell and deliver to the said defendants said goods, wares and merchandise, of the value of said sum of three hundred and twenty-one dollars and seventy-three cents ($321.73), and that the said defendants disposed of the same to their own use, and became wholly insolvent and bankrupt before the plaintiffs discovered the fraud that had been practiced upon them. That the plaintiffs have suffered damage by reason thereof in the sum of three hundred and twenty-one dollars and seventy-three cents ($321.73).

The plaintiffs therefore demand judgment against the defendants for the sum of $901.86, and interest on $349.30 from November 30, 1898, and interest on $230.83, part thereof, from January
6 24, 1899, and interest on $321.73, balance thereof, from March 25, 1899, besides the costs of this action.

GIBBONS & POTTLE,
Plaintiffs' Attorneys.

5 Erie Co. Sav. Bank Bldg., Buffalo, N. Y.

(Verified.)

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs,
against
CALVIN RUSSELL and CLARENCE T. BIRKETT, Defendants.

The defendant, Clarence T. Birkett, answering separately the complaint herein:

I.

Admits that the plaintiffs are, and were at the times mentioned in the complaint, co-partners, under the firm name of Tindle & Jackson, and that the defendants were, at the times herein mentioned, co-partners, under the firm name of Russell & Birkett; admits that the defendants purchased of the plaintiffs the merchandise mentioned in the complaint, at the times and prices therein set forth, and that the purchase price of said merchandise remains unpaid, and is due and owing to plaintiffs.

Further answering the complaint, this defendant denies
7 the same, and each and every allegation therein contained, except as hereinbefore admitted.

II.

For a further answer to said complaint, this defendant alleges that, on or about the 15th day of April, 1899, and after the purchase of the goods mentioned in the plaintiffs' complaint, these defendants, Russell & Birkett, as co-partners, and Calvin Russell and this defendant individually, were duly adjudged bankrupts in the United States District Court for the Northern District of New York, pursuant to the provisions of an Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898; that thereafter, and on or about the third and fourth days of May, 1899, before Hon. Charles A. Hawley, Referee in such bankruptcy proceedings, a meeting of the creditors of said defendants, constituting the firm of Russell & Birkett, was held at the village of Penn Yan, N. Y.; that at said meeting the plaintiffs herein duly proved their claim as creditors of said Russell & Birkett, in the amount set forth in said complaint as a claim due upon contract, and the said claim was admitted by said Referee

against the estate of the said Russell & Birkett before the commencement of this action.

III.

For a further answer to said complaint, this defendant alleges that, on the 12th day of September, 1899, at a term of the United States District Court, for the Northern District of New York, held at the city of Utica, Hon. Alfred C. Coxe presiding, the said firm of Russell & Birkett, co-partners, and this defendant individually,
8 were duly discharged in said bankruptcy proceedings, pursuant to the provisions of the Act mentioned in the second answer herein, and that, by such discharge, the claim of the plaintiffs for the merchandise set forth in the complaint was discharged as against said defendants as co-partners and against this defendant individually, and these defendants, as such co-partners, and this defendant individually, were thereby released from the payment of said claim or any part thereof, except as the same might be paid in the bankruptcy proceedings above referred to.

Wherefore, This defendant asks that the complaint herein be dismissed, with costs.

THOMAS CARMODY,
Attorney for Defendant Clarence T. Birkett.

Office and P. O. Address, Penn Yan, N. Y.

(Verified.)

At a Special Term of the Supreme Court, held at the City and County Hall, in the City of Buffalo, Erie county, N. Y., on the 6th day of March, 1900.

Present: Hon. John S. Lambert, Justice.

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs,
against
CALVIN RUSSELL and CLARENCE T. BIRKETT, Defendants.

Upon reading and filing the order to show cause, granted
9 in this action on the 2d day of March, 1900, by the Hon. Frederick W. Kruse, Justice of the Supreme Court, with proof of due service thereof upon the attorneys for both the defendants in this action, and upon the affidavit of Frank Gibbons, verified March 2, 1900, and upon the summons, complaint and separate answers of the defendants in this action, and the order of arrest granted in this action on September 6, 1899, by Hon. Daniel J. Kenefick, Justice of the Supreme Court, upon which papers the said order to show cause was granted, and upon motion of Frank Gibbons, Esq., of counsel for the plaintiffs, and L. C. Wilkie, Esq., of counsel for the defendants, appearing in opposition thereto, it is hereby

Ordered, That it appearing to the satisfaction of the Court that

the defendant, Calvin Russell, has died since the commencement of this action, and that the cause of action alleged in the complaint as to him has abated, that this action proceed to judgment as against the defendant, Clarence T. Birkett, individually and as survivor of himself and Calvin Russell, deceased, and that, for all purposes, the pleadings and other papers in this action shall be, and they are hereby amended in that respect, and that this action shall proceed as against the said defendant, Birkett, in all respects as if he were the sole defendant in the action.

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs,
against
CLARENCE T. BIRKETT, Defendant.

This cause being regularly at issue in this court by the
10 service of the complaint of the plaintiffs and the answer of the defendants, and the issue thus joined being regularly upon the calendar for the Trial Term of this court, held in and for the county of Erie, commencing on the 10th day of November, 1902, and the plaintiffs appearing upon said trial by Frank Gibbons, Esq., their counsel, and the defendant appearing by Thomas Carmody, Esq., his counsel, and a trial by jury having been waived by stipulation of counsel in open court, and the counsel for both sides having also stipulated in open court that said case, having been submitted to the undersigned Justice, might be decided by him after the final adjournment of the term of court, all irregularities in that respect being waived, and the undersigned Justice of the Supreme Court, being the judge presiding at said term, having heard the proofs and allegations of the respective parties, and due deliberation having been had, does hereby make or find the following—

Findings of Fact.

1. The plaintiffs, Thomas Tindle and Willis K. Jackson, at all of the times hereinafter named, were co-partners in trade under the firm name or style of Tindle & Jackson.

2. That at all the times hereinafter named, prior to the 14th day of April, 1899, the defendant and one Calvin Russell were co-partners in trade, under the firm name or style of Russell & Birkett, engaged in business as such at the village of Penn Yan, N. Y.

3. That since the commencement of this action, to-wit, prior to the 2d day of March, 1900, Calvin Russell, who was a defendant in this action at the time of the commencement thereof, died.

4. That, on the 6th day of March, 1900, an order was made
11 by this Court, at a Special Term thereof, held in and for the county of Erie, and duly entered in the office of the Clerk of the county of Erie on March 8, 1900, directing a continuance of the action against the defendant, Clarence T. Birkett.

5. On or about the 30th day of November, 1898, the plaintiffs, as such co-partners, sold and delivered to the co-partnership firm of Russell & Birkett, at their special instance and request, certain goods, wares and merchandise, consisting of a carload of barrel hoops, which in the aggregate were of the value of $349.30.

6. On or about the 24th day of January, 1899, the said plaintiffs, as such co-partners, sold and delivered to the said co-partnership firm of Russell & Birkett certain goods, wares and merchandise, which consisted of a carload of flour-barrel staves, of the value of $230.83.

7. On or about the 25th day of March, 1899, the plaintiffs, as such co-partners, sold and delivered to the said co-partnership firm of Russell & Birkett certain other goods, wares and merchandise, consisting of three-fourths of a carload of kiln-dried barrel staves, and one-fourth of a carload of fruit barrel staves, of the value of $321.73.

8. That each and all of the said sales were made upon credit, at the special instance and request of the said co-partnership firm of Russell & Birkett, and that such request was made on behalf of the said firm, in each instance, by the defendant, Clarence T. Birkett, and at each and all of said times the said defendant, Clarence T. Birkett, on behalf of the said co-partnership firm, and in order to induce the said plaintiffs to sell such goods upon such credit as aforesaid, falsely and fraudulently stated and represented to the plaintiffs that the assets of the said firm were equal to the sum of $195,819.47, including real estate consisting of flour mills and equipments,
12 warehouse, etc., of the value of $113,000, and that the only liabilities of the said firm were $42,961.25 in amount, made up of open accounts on the ledger to the amount of $1,390.60; mortgages on real estate, $27,000; bills payable due banks, $13,650; other liabilities, $920.65; and that the net worth of the said firm, over and above all liabilities, was $152,858.22, and that their business was large, increasing and profitable.

9. That each and all of the said representations were false and fraudulent, and were made to the plaintiffs, as aforesaid, in order to induce them to sell the said goods to the said firm of Russell & Birkett, and that each and all of the said statements and representations were known by the said defendant, Clarence T. Birkett, and by the said firm of Russell & Birkett, to be false and fraudulent, and were made, as aforesaid, with the intent, and for the purpose, to deceive and defraud the said plaintiffs, and to induce them to sell and deliver the said goods.

10. That the plaintiffs, at each of the times of such sales, relied upon such statements, so made by the defendant on behalf of the said firm of Russell & Birkett, as aforesaid, and believed them each to be true, and in reliance thereon did sell and deliver the aforesaid goods, wares and merchandise on each of said occasions.

11. That before the plaintiffs discovered the fraud which had been practiced upon them, as aforesaid, the said firm of Russell & Birkett, and this defendant, Clarence T. Birkett, became wholly insolvent.

12. That the plaintiffs did not discover the falsity of the said statements until the 2d day of May, 1899.

13. That by reason of such false and fraudulent statements,
13 as aforesaid, the plaintiffs have suffered damages in the amount of the value of the goods so sold and delivered, as follows, to-wit:

On the 30th day of November, 1898, the sum of $349.30.

On the 24th day of January, 1899, the sum of $230.83.

On the 25th day of March, 1899, the sum of $321.73.

14. That the said statements, as aforesaid, were false, and known to be false by the said defendant, and by the said firm of Russell & Birkett, in the following respects:

In addition to the debts enumerated by the said defendant on behalf of the said firm, as aforesaid, the said firm of Russell & Birkett were indebted to the following named persons in the following sums:

(*a*) To Roselle Russell, for borrowed money, $26,120.47.

(*b*) To Cora Russell, for borrowed money, $4,010.10.

(*c*) To Mabel Russell, for borrowed money, $1,408.07.

(*d*) To Henry Russell, for borrowed money and accommodation endorsements, $20,000.

And in addition to the mortgage indebtedness of $27,000 specified by the said defendant in behalf of the said firm of Russell & Birkett, as aforesaid, the real property of the said firm, as hereinbefore mentioned, was encumbered by two other mortgages, to secure the payment of certain bonds issued by the Penn Yan Electric Light Company, to the amount of $95,000, which mortgages were then unrecorded, and which were a lien upon the said property to the amount thereof.

15. Instead of being large, increasing and profitable, the business of the said firm of Russell & Birkett was, and for some time past had been, unprofitable, and had been becoming more and more unprofitable from year to year.

14 16. On the 15th day of April, 1899, the said firm of Russell & Birkett, and the said defendants, Clarence T. Birkett and Calvin Russell, individually, filed a petition in voluntary bankruptcy in the District Court of the United States for the Northern District of New York, praying that they be adjudicated bankrupt in accordance with the provisions of the Act of Congress in that respect, and that, on that day, they were duly adjudicated bankrupt by the said Court, which had full jurisdiction and authority so to do.

17. That the plaintiffs never proved their claim in the said District Court in such proceeding, and never took, received or accepted any dividend thereon, and never, in any manner, became parties to the proceeding.

18. On the 12th day of September, 1899, an order was made in said proceeding by the said District Court of the United States for the Northern District of New York, held at the city of Utica, N. Y., also in accordance with the terms of the Act of Congress, to the effect that the said firm of Russell & Birkett, as co-partners, and this defendant, Clarence T. Birkett, individually, should be discharged, in said bankruptcy proceedings, from their debts which are, under the terms of said Act of Congress, legally and properly dischargeable.

19. That the several causes of action upon which this action is

brought are not causes of action dischargeable in bankruptcy, according to the terms of the Acts of Congress hereinbefore mentioned.

And from the foregoing Findings of Fact I hereby make or find the following

Conclusions of Law.

1. That neither the defendant, Clarence T. Birkett, nor
15 the firm of Russell & Birkett, were, by the said order of the said District Court of the United States for the Northern District of New York, made on the said 12th day of September, 1899, nor by the said proceedings in bankruptcy commenced by the filing of their said petition in said court, discharged of or from the payment of any of the liabilities or causes of action hereinbefore mentioned.

2. That the plaintiffs are entitled to recover and have judgment against the defendant, Clarence T. Birkett, for the amount of the said several items of damages for said fraud and deceit, with interest thereon to the day of the date hereof, which amounts in the aggregate, for principal and interest, to the sum of $1,149.56, together with the costs of this action, to be taxed by the Clerk, and that the said plaintiffs are entitled to an execution against the person of the said defendant, Clarence T. Birkett.

Let judgment be entered accordingly.

Dated Buffalo, N. Y., August 25, 1903.

DAN'L J. KENEFICK,
Justice of the Supreme Court.

16 Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON,
against
CLARENCE T. BIRKETT.

Clarence T. Birkett, the defendant in the above entitled action, excepts to the Findings of Fact and Conclusions of Law of Hon. Daniel J. Kenefick, Justice of the Supreme Court of Erie county, which findings were filed in the Erie County Clerk's office on August 26, 1903, as follows:

He excepts to that portion of the eighth Finding of Fact which reads as follows:

"8. And at each and all of said times the said defendant, Clarence T. Birkett, on behalf of the said co-partnership firm, and in order to induce the said plaintiffs to sell such goods upon such credit as aforesaid, falsely and fraudulently stated and represented to the plaintiffs that the assets of the said firm were equal to the sum of $195,819.47, including real estate consisting of flour mills and equipments, warehouse, etc., of the value of $113,000, and that the only liabilities of the said firm were $42,961.25 in amount, made up of open accounts on the ledger to the amount of $1,390.60; mortgages

on real estate, $27,000; bills payable due banks, $13,650; other liabilities, $920.65; and that the net worth of the said firm, over and above all liabilities, was $152,858.22, and that their business was large, increasing and profitable."

He excepts to the ninth Finding of Fact, and to the whole thereof, which reads as follows:

"9. That each and all of the said representations were false and fraudulent, and were made to the plaintiffs, as aforesaid, in
17 order to induce them to sell the said goods to the said firm of Russell & Birkett, and that each and all of the said statements and representations were known by the said defendant, Clarence T. Birkett, and by the said firm of Russell & Birkett, to be false and fraudulent, and were made, as aforesaid, with the intent, and for the purpose, to deceive and defraud the said plaintiffs, and to induce them to sell and deliver the said goods."

He excepts to the tenth Finding of Fact, and to the whole thereof, which reads as follows:

"10. That the plaintiffs, at each of the times of such sales, relied upon such statements, so made by the defendant on behalf of the said firm of Russell & Birkett, as aforesaid, and believed them each to be true, and in reliance thereon did sell and deliver the aforesaid goods, wares and merchandise on each of said occasions."

He excepts to the eleventh Finding of Fact, and to the whole thereof, which reads as follows:

"11. That before the plaintiffs discovered the fraud which had been practiced upon them, as aforesaid, the said firm of Russell & Birkett, and this defendant, Clarence T. Birkett, became wholly insolvent."

He excepts to the twelfth Finding of Fact, and to the whole thereof, which reads as follows:

"12. That the plaintiffs did not discover the falsity of the said statements until the 2d day of May, 1899."

He excepts to the thirteenth Finding of Fact, and to the whole thereof, which reads as follows:

"13. That by reason of such false and fraudulent statements, as aforesaid, the plaintiffs have suffered damages in the amount of the value of the goods so sold and delivered, as follows, to-wit:
18 On the 30th day of November, 1898, the sum of $349.30.
On the 24th day of January, 1899, the sum of $230.83.
On the 25th day of March, 1899, the sum of $321.73."

He excepts to the fourteenth Finding of Fact, and to the whole thereof, which reads as follows:

"14. That the said statements, as aforesaid, were false, and known to be false by the said defendant, and by the said firm of Russell & Birkett, in the following respects:

In addition to the debts enumerated by the said defendant on behalf of the said firm, as aforesaid, the said firm of Russell & Birkett were indebted to the following named persons in the following sums:

(*a*) To Roselle Russell, for borrowed money, $26,120.47.

(*b*) To Cora Russell, for borrowed money, $4,010.10.

(*c*) To Mabel Russell, for borrowed money, $1,408.07.

(*d*) To Henry Russell, for borrowed money and accommodation endorsements, $20,000.

And in addition to the mortgage indebtedness of $27,000 specified by the said defendant in behalf of the said firm of Russell & Birkett, as aforesaid, the real property of the said firm, as hereinbefore mentioned, was encumbered by two other mortgages, to secure the payment of certain bonds issued by the Penn Yan Electric Light Company, to the amount of $95,000, which mortgages were then unrecorded, and which were a lien upon the said property to the amount thereof."

He excepts to the fifteenth Finding of Fact, and to the whole thereof, which reads as follows:

"15. Instead of being large, increasing and profitable, the business of the said firm of Russell & Birkett was, and for some time past had been, unprofitable, and had been becoming more
19 and more unprofitable from year to year."

He excepts to the seventeenth Finding of Fact, and the whole thereof, which reads as follows:

"17. That the plaintiffs never proved their claim in the said District Court in such proceeding, and never took, received or accepted any dividend thereon, and never, in any manner, became parties to the proceeding."

He excepts to the nineteenth Finding of Fact, and to the whole thereof, which reads as follows:

"19. That the several causes of action upon which this action is brought are not causes of action dischargeable in bankruptcy, according to the terms of the Acts of Congress hereinbefore mentioned."

He excepts to the first Conclusion of Law, and to the whole thereof, which reads as follows:

"1. That neither the defendant, Clarence T. Birkett, nor the firm of Russell & Birkett, were, by the said order of the said District Court of the United States for the Northern District of New York, made on the said 12th day of September, 1899, nor by the said proceedings in bankruptcy commenced by the filing of their said petition in said court, discharged of or from the payment of any of the liabilities or causes of action hereinbefore mentioned."

He excepts to the second Conclusion of Law, and to the whole thereof, which reads as follows:

"2. That the plaintiffs are entitled to recover and have judgment against the defendant, Clarence T. Birkett, for the amount of the said several items of damages for said fraud and deceit, with interest thereon to the day of the date hereof, which amounts in the aggregate, for principal and interest, to the sum of $1,149.56, together with the costs of this action, to be taxed by the Clerk, and
20 that the said plaintiffs are entitled to an execution against the person of the said defendant, Clarence T. Birkett."

Dated Penn Yan, N. Y., September 3, 1903.

THOMAS CARMODY,
Attorney for Defendant,
Penn Yan, N. Y.

(Endorsed:) "Take notice that the within is a copy of the exceptions in this action, duly filed with the Clerk of the county of Erie on the 4th day of September, 1903. Dated Sept. 4, 1903. Thomas Carmody, Att'y for Def't, Penn Yan, N. Y. To Gibbons & Pottle, Att'ys for Plaintiffs, Buffalo, N. Y."

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON
against
CLARENCE T. BIRKETT.

This action having been commenced by the service of a summons, with a copy of the verified complaint against the defendant, Clarence T. Birkett, and against one Calvin Russell, and both defendants in the action having been arrested by the Sheriff of the county of Yates, pursuant to an order of Hon. Daniel J. Kenefick, Justice of the Supreme Court, bearing date September 6, 1899, and both defendants having been released upon bail, and the said order of arrest remaining undischarged, and the said Calvin Russell having died subsequent to the time of the commencement of the action and
21 prior to the trial thereof, and an order having been made and entered in the office of the Clerk of the county of Erie on the 6th day of March, 1900, directing that the action continue as against the defendant Clarence T. Birkett only, and the defendant Birkett having duly appeared in the action by Thomas Carmody, Esq., his attorney, and served his answer to the said complaint, and the issue thus formed having been regularly upon the calendar for the trial term of the Supreme Court, held in and for the county of Erie, commencing on the second Monday of November, 1902, and being reached for trial in its order thereon, and both parties having appeared upon said trial, the plaintiffs by Frank Gibbons, Esq., their counsel, and the defendant by Thomas Carmody, Esq., his counsel, and having waived trial by jury, and consented that the cause might be tried before the Court without a jury, and that the decision of the Court might be rendered subsequent to the final adjournment of the term, all irregularities in that respect being expressly waived by stipulation of counsel, made in open court upon such trial, and the Court having thereupon heard the proofs and allegations of the respective parties, and the Justice presiding at such trial having rendered a decision in writing, bearing date the 25th day of August, 1903, which among other things directs a judgment in favor of the plaintiffs as against the defendant for the sum of $1,149.56 and costs, as damages for fraud and deceit practiced upon the plaintiffs by the defendant, and the plaintiffs' costs and disbursements having been duly adjusted by the Clerk of the county of Erie at the sum of $605.66,—

Now, upon motion of Gibbons & Pottle, attorneys for the plaintiffs, it is hereby—

Adjudged, That Thomas Tindle and Willis K. Jackson, plaintiffs,

recover and have judgment against Clarence T. Birkett, the
22 defendant, for the sum of $1,149.56, as damages for such fraud and deceit, together with the further sum of $605.66 for their costs and disbursements of this action, amounting in all to the sum of $1,755.22, and that said plaintiffs have execution therefor, both against the property and the person of the defendant.

Judgment signed this 4th day of September, 1903.

CARL J. SEYMOUR,
Deputy Clerk.

23 Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON. Plaintiffs,
against
CLARENCE T. BIRKETT, Defendant.

SIRS: You will please take notice that the defendant, Clarence T. Birkett, hereby appeals to the Appellate Division of the Supreme Court for the Fourth Judicial Department, from the judgment entered in this action in the office of the Clerk of Erie county, on the 4th day of September, 1903, in favor of the plaintiffs and against the defendant, in the sum of eleven hundred forty-nine dollars and fifty-six cents, damages, and six hundred five dollars and sixty-six cents, costs, amounting in all to seventeen hundred fifty-five dollars and twenty-two cents ($1,755.22), and from the whole thereof.

Dated Penn Yan, N. Y., September 18, 1903.

THOMAS CARMODY,
Attorney for Defendant,
Penn Yan, N. Y.

To Messrs. Gibbons & Pottle, Attorneys for Plaintiffs, and to the Clerk of the County of Erie.

(Endorsed:) "Sirs: Take notice of a Notice of Appeal in the within entitled action, a copy of which is herewith served upon you, duly filed in the office of the Clerk of Erie county on the 21st day of September, 1903. Dated September 21, 1903. Thomas Carmody, Att'y for Defendant, Penn Yan, N. Y. To Messrs. Gibbons & Pottle, Attorneys for Pl'ffs."

24 *Case and Exceptions.*

The following is the case and exceptions upon the appeal in this action to the Appellate Division of the Supreme Court for the Fourth Judie-al Department, to-wit:

This action came on for trial at a Trial Term of the Supreme Court, held in and for the county of Erie, on the 26th day of November, 1902, before Hon. Daniel J. Kenefick, Justice of the Supreme Court, a jury being waived in open court.

Appearances.

For the Plaintiffs: Gibbons, Pottle & Talbot.
For the Defendant: Thomas Carmody, Calvin J. Huson, of Counsel.

JOHN C. COOK, sworn for the plaintiffs, testified as follows:

To Mr. GIBBONS:

I reside in Rochester, N. Y., and am manager for R. G. Dun & Company. Have been manager since January 1, 1893. Their business is mercantile agency, in the course of which they gather information throughout the country relative to the financial standing and responsibility of different business concerns, for the purpose of publishing it to their subscribers or conveying it to them. They also publish a book of ratings. The book is rented to the subscribers of the agency throughout the country, and used by them. They have offices and agencies throughout the United States and Canada.

I am acquainted with the defendant, Clarence T. Birkett. I was not acquainted with his partner, Mr. Russell, during his lifetime. I think I remember the rating Russell & Birkett had in our agency prior to their failure. I have the letter dated October 2, 1897, from Russell & Birkett, and the statement which was enclosed in it. That is the letter and statement. This statement was typewritten, and enclosed in same envelope with the letter of October 2, 1897.

Mr. Carmody admitted the genuineness of the signature.

Mr. GIBBONS:

I offer statement in evidence.
Received and marked "Plaintiffs' Exhibit A."

"Statement Russell & Birkett.

September 16, 1897.

Cash on hand	$1,054.75
Cash in bank	6,032.15
Bills receivable, due from customers	1,380.58
Accounts due from customers	28,803.01
Accounts receivable, due from partners	860.48
Merchandise, actual present cash value	44,388.50
Mills A and B, and equipment	97,500.00
Electric Light block	7,500.00
Warehouse and real estate adjacent	8,000.00
Mortgages	300.00
	$195,819.47

Liabilities.

Open accounts on ledger	$1,390.60
Other liabilities	920.65
Bills payable, due banks	13,650.00
Mortgages on real estate	27,000.00
Total liabilities	$42,961.25
Net worth	152,858.22
	$195,819.47

26 Mr. GIBBONS:

I also offer in evidence the letter.

Received and marked "Plaintiffs' Exhibit B."

"PENN YAN, N. Y., *Oct.* 2, 1897.

J. H. Cook, Esq., Manager R. G. Dun & Co., Rochester, N. Y.

DEAR SIR: As promised your Mr. Wilson some days ago, when he called here, we enclose herewith statement of our business on September 16, 1897, or at the close of business on September 15, 1897.

We would respectfully request, if you have occasion to refer to this statement, that you would not state therein that we place this value of $97,500 on our plant, for this reason: We have had considerable controversy with the Assessors here about its value, they being inclined to put it up to a very excessive figure, compared with other real estate in this town. We would not object if we were all assessed on the same basis. You can readily see it would be very uncomfortable for us if they were to get, indirectly even, in their possession (which is sometimes done), a copy of this statement.

Thanking you in advance for this courtesy, we beg to remain,

Very truly yours, RUSSELL & BIRKETT."

Genuineness of letter of November 2, 1898, is admitted.

WITNESS:

I received that letter of November 2, 1898, from Russell & Birkett.

Mr. GIBBONS:

I will offer in evidence this letter of November 2, 1898.

27 Received and marked "Plaintiffs' Exhibit C."

"PENN YAN, N. Y., *Nov.* 2, 1898.

Mr. J. H. Cook, Manager, Rochester, N. Y.

DEAR SIR: Replying to your recent inquiry in reference to our condition and commenting on our rating, we find that we made you a statement on the 1st of September last year.

We have not the time at this writing to prepare a statement, but

will endeavor to do so a little later, just as soon as our rush is over, this being our busy time of year.

We would beg to say, however, that our business is large, increasing and profitable, and that we are entitled to the rating you give us. There is no material change from the statement issued on September 1, 1897. If anything, we can show a more favorable one.

Yours truly, RUSSELL & BIRKETT."

At that time I had a man in my employ by the name of Arthur E. Seales, as reporter. I sent him to visit Russell & Birkett, not on any particular occasion, but in general with others. He would call upon all business men in Penn Yan when he happened to be there. Russell & Birkett were engaged in the general milling business in Penn Yan. I think it was in April, 1899, they failed. We used that statement and the letter of November 2d in revising our previous report and rating. At the time we obtained this statement I did not know of an indebtedness from Russell & Birkett to Roselle Russell, wife of Calvin Russell, for $26,221.47. I did not know of a similar indebtedness from that firm to Cora Russell of $4,010.10, or another indebtedness from that firm to Mabel Russell of $1,408.07. I did not know of any indebtedness of that firm for from ten to
28 twenty thousand dollars for accommodation paper. I did not know of another indebtedness from that firm to Henry Russell. When this statement was received I did not know of the existence of a mortgage to secure a contingent liability upon the electric light plant at Penn Yan for $95,000 or thereabouts. I may have gained that information a few days before the petition in bankruptcy was filed, when the deeds were put on record, or the mortgages. We did not gain that information before they were put on record. I did not know of these debts spoken of before the petition was filed in bankruptcy. The rating Dun & Co. gave Russell & Birkett was C plus 1. The C indicates we estimate their responsibility at from $125,000 to $200,000. The plus is part of the C; 1 indicates high credit rating.

Q. Would they have received that rating if you had known of these several items of indebtedness I have mentioned?

Mr. CARMODY:

That is objected to as calling for a conclusion, and as improper.

Objection overruled. Exception.

A. They would not.

Q. What would have been their rating?

Mr. CARMODY:

Same objection.

Overruled. Exception.

A. I could answer that better if you would put it in two parts.

Q. What effect would these several items have had upon their rating if you had known of them?

29 Mr. CARMODY:

That is objected to as improper, incompetent and calling for a conclusion of the witness.

Overruled. Exception.

A. The several items of indebtedness to different members of the family would naturally have increased their liabilities, and decreased their surplus accordingly. That would perhaps have reduced their capital rating from C plus to C.

The mortagage of $95,000 would also have to be taken into consideration.

Q. Would that be considered as an incumbrance upon their property?

Mr. CARMODY:

That is objected to as leading.

Overruled. Exception.

A. It would be considered as a contingent liability. The rating C means $75,000 to $125,000. The effect of the $95,000 mortgage upon the rating of Russell & Birkett would depend entirely upon the financial condition of the electric light plant at that time. We did not investigate that because we had no knowledge of the mortgage at that time. If we had found the electric light plant of somewhat uncertain condition I would have taken the whole mortgage into consideration and rated it accordingly.

Cross-examination to Mr. CARMODY:

Russell & Birkett had a rating in our firm prior to our receiving this letter dated September, including the statement of September 16, 1897. The rating was the same before the receipt of that statement as after. Before the receipt of that statement it was expressed
30 by the same symbols that I have testified to as indicating their rating now. That rating had existed, presumably, for several years. I couldn't state exactly how long. I believe it had existed for several years. This rating was originally based on statements. Our means of ascertaining the rating to be given various upon circumstances In this case we have a statement to be guided by. In making our ratings in some cases we are guided by statements and in others by the information obtained outside of traders. We usually make investigations of our own to ascertain the truth of the statements made. If there is any banking indebtedness mentioned in a statement received, we usually try to gather, through the bank where the trader deposits, information aside from the statements received. As regards real estate incumbrances, we would naturally consult the county records where the property is located. The assessors' books sometimes show the value of real estate. We have local agents who make investigations and report to our agency. They are taken into account in our fixing the ratings. At that time we had one at Penn Yan. One of my employees made investigations along the lines I have indicated in regard to the financial worth of Russell & Birkett. We made several investigations prior to the statement of September 16, 1897. Our rating is intended to repre-

sent the financial strength of a trader and the grade of credit. The rating is the consensus of numerous opinions we may have gathered. After receiving all our information we come to the conclusion what the rating should be; what we think they are entitled to. In reaching that conclusion, we take into account any statements we may have received, any reports we may have received from our agents, our own investigation as to the value of the real estate, and our
31 own investigation at banks as to the condition of the banking business. Our rating originally must have been made and continued on such investigations, because the same rating existed before the making of this statement. I believe we received a statement prior to this. That rating was continued by these symbols down to the time of the failure, in April, 1899. Providing the Electric Light Company was abundantly responsible and doing a prosperous business, and the property was worth the amount of the encumbrance, we would not regard this $95,000 as a liability that would figure in the rating of Russell & Birkett. Providing it was worth $95,000, I would take it into consideration, because, if the affairs ceased and the plant was sold under foreclosure, it is fair to presume there would be a shrinkage. If we found the property in the mortgage was worth the amount of indebtedness, then I would not regard it as a liability as seriously as otherwise.

If we found Russell & Birkett were carrying the customers' paper at the bank, left there for collection or for payment, that would not be taken into consideration in the rating. Our rating is intended to represent the solid property of the person rated, or our judgment of what the solid property is worth. Mr. Seales is at present in Texas. Our office is at Rochester. I am the manager. Mr. Seales is a traveling reporter. He made investigations himself, and gave me his judgment as to the worth of the party investigated. His report contained an estimate of what he thought the rating should be, of what he found, and so on.

Redirect examination to Mr. GIBBONS:

If we knew of a man who took his customers' paper, endorsed it, and deposited it in the bank, and credited himself with the
32 proceeds of it as assets of his business, we would naturally charge against that the contingent endorsement. We would naturally take into account a collateral or contingent liability, if it was a lien on specific property that was mentioned, and report it to our customers for their guidance.

Recross-examination to Mr. CARMODY:

We send special reports to customers who require them, which contain the private information that cannot be put in our book of ratings. Customers make application for them, especially where the capital rating is out of proportion to the credit rating. Our symbols show a credit as well as a capital rating. That means the amount of credit to which a party is entitled, and if that credit is out of proportion to the capital rating that we have, it is proper precaution for customers to require a special report; it would suggest that. As to the ratings here, the C plus 1 represents $125,000 to $200,000, and

the C indicates an estimated value of $75,000 to $125,000. That 1 refers to the credit rating; that means high. That is the highest there is for the capital rating. If we knew of contingent liabilities, even if it did not make a difference in the capital rating, it would be very apt, most likely, to make a difference in the credit rating.

33 Mr. GIBBONS:

I offer in evidence the petition and schedule in voluntary bankruptcy in the Northern District of New York, made by Calvin Russell and Clarence T. Birkett, co-partners under the firm name of Russell & Birkett, verified the 12th day of April, 1899, filed in the office of the Clerk of the District Court of the United States for the Northern District of New York on April 13, 1899, except the part which mentions plaintiffs' claims. The particular part I wish to put in is the summary at the end, the summary of debts and assets from statements in Schedules A and B, showing the total debts, as per Schedule A, $278,087.93, total assets, as per Schedule B, $180,444.48. And also the schedule showing the debts to Roselle Russell.

And I also offer in evidence proofs of claim of Henry Russell, which were filed in that case and allowed in that case by the Referee on May 2, 1899.

I also offer in evidence the proofs of claim of Cora Russell for $4,010.10.

Here is one indebtedness to Henry Russell of four promissory notes of $5,000 each, dated December 27, 1898, on demand, endorsed Russell & Birkett, secured by one hundred and ninety-three shares of the Penn Yan Steam Heating Company stock, par value $19,300, an item of $20,000.

Also one claim for $5,486.63, with interest from January 1, 1898, consideration promissory note made and delivered by Calvin Russell to Henry Russell, payable on demand.

Here is one of $4,037.91, in the shape of a promissory note
34 of Russell & Birkett, dated January 3, 1899, with interest, payable on demand; a note for the sum of $9,500, dated January 3, 1899, to the order of Henry Russell; also the claims of Cora Russell, $4,010.10, in the shape of a promissory note dated March 3, 1898, made by Russell & Birkett to her order, payable on demand, with interest.

Also the claims of Roselle Russell for $26,120.47, on a promissory note dated March 30, 1898, payable on demand, with interest, made by Russell & Birkett to her order.

Also claim of Mabel Russell for $1,408.07, upon a promissory note dated March 30, 1898, payable on demand to her order, with interest.

Received.

Mr. CARMODY:

I desire to offer from the bankruptcy schedules, at Page 12, Schedule A-3, the claim of the plaintiffs here, as follows:

Tindle & Jackson: Residence, Buffalo, N. Y.; the date when

shipped, March 18, 1899, for merchandise purchased by petitioners of the value of $321.73.

By the COURT:

I will allow it.

Mr. CARMODY:

And from Schedule A-3, Number 22, from the same schedule, claims of creditors, the claim of Tindle & Jackson, contracted about March 18, 1899, for merchandise purchased by Birkett of Tindle & Jackson, in the amount of $512.

Received in evidence.

35 THOMAS TINDLE, sworn for plaintiffs, testified as follows:

To Mr. GIBBONS:

I am one of the plaintiffs in this action, and reside in Buffalo. I am a member of the firm of Tindle & Jackson. Willis K. Jackson is the other partner. The firm was in business in Buffalo in 1898 and 1899, manufacturing and dealing in cooperage stock. I remember some dealings this firm had with Russell & Birkett, of Penn Yan.

Mr. GIBBONS:

I offer in evidence the following letters, all being written by Russell & Birkett to Tindle & Jackson, one each dated November 28, 1898, November 30, 1898, December 9, 1898, December 12, 1898, December 21, 1898, telegram January 24, 1899, second telegram of same date, and letter of same date, January 25, 1899, February 15, 1899, March 25, 1899, telegram of March 25, 1899, letter of March 27, 1899, and telegram of March 25, 1899.

Received in evidence and marked "Plaintiffs' Exhibits M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z," respectively, which letters are as follows:

EXHIBIT M.

"Nov. 28, 1898.

GENTLEMEN: At what price can you deliver us a car of
36 strictly No. 1 dry flat hoops, same as heretofore purchased from you? We desire only the best quality."

EXHIBIT N.

"Nov. 30, 1898.

GENTLEMEN: We have yours of the 29th instant, and note contents. Please ship immediately, if the Belleaire hoops are strictly No. 1 in every respect, at your quotation, a carload, delivered via the Fall Brook R. R."

EXHIBIT O.

"DEC. 9, 1898.

Have you shipped the carload of hoops yet? We are very much in need of them."

EXHIBIT P.

"DEC. 12, 1898.

We have your letter of the 10th instant, and hope you will hurry forward the car of hoops as fast as possible, as we are very much in need of them."

EXHIBIT Q.

"DEC. 21, 1898.

Please quote us price on No. 1 flour bbl. heading, delv."

EXHIBIT R.

"JAN. 24, 1899.

Ship us immediately, via Fall Brook Route, minimum carload flour bbl. staves."

37 EXHIBIT S.

"JAN. 24, 1899.

Price is very high. If you can do no better, ship minimum car."

EXHIBIT T.

"JAN. 24, 1899.

We wired you to-day to ship us immediately, via Fall Brook route, a minimum car of 28½ flour bbl. staves. We supposed we had plenty of flour bbl. staves on hand, but find on investigation they are all 30 in., and cannot use them for flour bbls."

EXHIBIT U.

"JAN. 25, 1899.

Yours of the 24th inst. at hand. We desire all 28½ in. flour bbl. staves."

EXHIBIT V.

"FEB. 15, 1899.

We have your letter of Feb. 14th, and note contents. We enclose herewith accepted draft, payable sixty days after date, for both bills, the last one of which is not due. We have added interest at the rate of 6 per cent. for the length of time draft is made.

Trusting you can use it, and that it will be satisfactory, we remain, etc."

EXHIBIT W.

"MAR. 25, 1899.

We have your wire this afternoon in answer to ours, and have telegraphed you in reply, as per confirmation enclosed here-
38 with, to ship us immediately, via Fall Brook route, three-quarters (¾) of a carload of kiln-dried staves, and balance of car fruit staves, at your quotations. Please get the car off at once, as we are in great need of the staves."

EXHIBIT X.

"MAR. 25, 1899.

Ship immediately, via Fall Brook, three-quarters kiln-dried staves, balance fruit staves, price quoted."

EXHIBIT Y.

"MAR. 27, 1899.

We have your letter of March 25th, and note contents. We instructed you in a former letter to ship the car of staves and heading at once, and trust you have already gotten the same off to us. While these prices are exceedingly high, we are in need of staves, as nearly all our orders are for barrels, and we are obliged to have them, no matter what the price is. When you can make a lower price, let us hear from you."

EXHIBIT Z.

"MARCH 25, 1899.

Wire lowest will sell minimum car flour bbl. staves, Buffalo shipment."

Q. Mr. Tindle, when you received those orders, what did you do to ascertain the responsibility of Russell & Birkett, if anything?

Mr. CARMODY:

Objected to as improper and immaterial.
Overruled. Exception.

39 I looked up their rating in Dun's, also in Bradstreet's, and gave them credit.

I was a subscriber to the two agencies at that time. I don't remember just what rating I found, but it was considerable over $100,000 in each book.

Q. Was it your custom to use these books of Dun and Bradstreet in your business—their rating books?

Mr. CARMODY:

That is objected to as improper and immaterial.
Overruled. Exception.

A. Whenever we received an order for anything like a carload of stock we always look up their rating, especially if they are parties we do not do much business with.

We relied upon these ratings in this case. This is true on each occasion that we received these orders offered in evidence. We knew nothing about the responsibility of this firm aside from their rating. We used Dun's book the most. I don't know which is most correct, but we have used Dun's most. We look them up in Dun's, then see if Bradstreet corroborates them, and, if there is much of a variation, we ask for a special report. We accept it if we find them substantially the same.

Cross-examination to Mr. CARMODY:

We have been subscribers to Dun's probably fifteen years. I don't know how they make up their ratings. I know their signs, and when I look up a rating I turn to front page that shows what different signs mean. I don't know whether or not they make investigations aside from statements received from the persons rated. We have been rated in Dun and Bradstreet's. Our rating is not stated at any fixed figure—from so much to so much, I believe. I suppose that
40 represents the judgment of the agency based upon all the information at their disposal. I don't know what investigations they make. I have heard they had traveling agents. I don't think we have received any inquiries at our office. At the end of each business year our bookkeeper draws off a full report of our business, as the boks show—deb-ts and credits—and presents one copy to myself, one to my partner, one to the bank where we do our business, and another to each of the commercial agencies. That statement shows our worth to be a certain sum. I don't know whether we are rated for that sum. They rate us just what they like. They rate us as they see fit. I know they don't rate us for any more than those figures. They rate us between certain extremes, which is from $100,000, say, to $150,000, from a certain amount to a certain amount. Our statement, of course, shows a fixed sum, and the rating is between certain fi-ures not identical with the figures contained in our statement, I presume, though I don't know really how we are rated.

Q. How long have you been dealing with Russell & Birkett?

A. I looked our order book up, and I can go back as far as 1892; some small transactions in 1892.

Q. Was the firm of Tindle & Jackson then in business?

A. No, sir, I do not think they were.

Q. What was the title of the firm?

A. Thomas Tindle & Company, I think, at that time.

Q. And from that time you have been connected with the business?

A. Yes, sir.

Q. Down to the dealings with Russell & Birkett?

A. Yes, sir.

41 Q. Your dealings from 1892 down to the time of their failure were continuous?

A. Well, I don't know what you would call continuous. I believe some years there was just one small order of a few dollars only.

I have a memorandum in my pocket taken from our order book. There appears to have been something got by them in each year. Very small amount in some years. I have a memoranda taken from our order book. On May 13, 1893, we sold them 12,000 head liners; on October 3, 1893, 12,000 14-inch head liners. The price of these head liners was forty cents per thousand. The whole bill was $4.80; the quantity was about a wheelbarrow load. On January 29, 1894, 12,000 12-inch liners; February 14, 1894, a small load staves, 5,000 staves, 300 sets of heading and 1,300 groove hoops. That is one wagon load. On March 10, a small mixed carload; hoops, staves and heading, I suppose. This last carload would probably be in the

neighborhood of $300. I ascertained their rating from whatever book we had then, Dun's, I presume. I don't know whether we had Bradstreet's then or not. I am sure I consulted Dun and Bradstreet, whatever book we had. Our custom was the same at that time as it was when these goods were purchased in the complaint. I gave $300 as an estimate. That is about as much as each of the sales sued for here, aggregating $900. That sale was March, 10, 1894. The next sale was May 31, a barrel heater. I presume it would be $12 or $14. The next sale was June 8, 1894, a small mixed car. I said about $300. Whatever it may have been, it wouldn't have been much over $200. The next sale was June 25, 12,000 head liners, worth $4.80. I have none on June 14, for merchandise, $271.55. It is barely possible that would be this small mixed car. I recollect testifying before. June 14, 1894, that is a small carload,
42 that would be $271.55. The next sale is September 24, 1894, when we booked the order, a small car lot, for $318.25, shipped September 24, 1894. That amount was about as large as either of the sales made in the years 1898 or 1899. At that time I ascertained their ratings from the commercial agencies. We would not have sold if we did not find their rating there. We had to find out something about them. I don't know that they were not rated at that time. If they had not been I think I should have known it and taken some other means to find out their rating. They paid us for these goods. I don't remember now. I have no recollection of any notes being given prior to this last transaction. I don't think there was any further time than what we call cash for thirty days. So far as I know they paid our bills in reference to that car lot. Up to the time these goods were sold they had paid for every order. Between September 24, 1894, and January 3, 1898, we sold them forty-one other invoices. If customers don't pay for what they got we don't give them more credit. If they were trading with us right along, and continued to pay, it would have some effect on extending credit. If a party has been dealing with us for six years, and buying several invoices each year, some of which amount to $300, and for which we receive payment according to our custom as the bills are due, it would have some effect upon the credit extended to the party. I don't consider it really a rating if they don't have a capital rating, just a credit rating. I should not rely on such.

Re-direct examination to Mr. GIBBONS:

When we find a credit rating without a capital rating, before giving any credit we usually ask for a special report. I don't know whether we did or not in this case.

43 Mr. Gibbons reads stenographer's minutes of testimony given by Clarence T. Birkett, May 3, 1899, in bankruptcy court as follows:

CLARENCE T. BIRKETT, of Penn Yan, in the county of Yates, and state of New York, being duly examined at the time and place above mentioned, upon his oath, says:

I am one of the members of the firm of Russell & Birkett. This proof of claim filed by Henry Russell showing an endorsement on the note, under date of April 14, 1899, by amount transferred from ledger account, as part payment to apply on within note, $4,473.20, is made up of credits we had on our books, cash we had remitted him, and some shipments, probably of feed and flour. They were made some time previously. I can't tell when, approximately February or March. Our books will show exact date. Most of the credits were remittances. This debt was contracted two or three years previous. Our books show the date. We had been indebted to him quite largely. The debt was mostly for cash loaned us. We usually gave him notes for what he loaned us. I don't remember exact date. Schedule shows about $20,000 for endorsements. We have owed him that probably three years. I am just estimating that.

This mortgage for $95,000, specified in Schedule B, 1-7, of the inventory filed with the petition, was given in 1893, I think. I don't know when it was recorded. It was given at the time it was dated. It was given for the release of Mrs. Stimpson, issued by the Electric Light and Power Company, as I understand it. It is then security for a contingent liability to the amount of $95,000. The liability still exists, and has ever since the mortgage was given.

The accommodation notes for the Penn Yan Electric Light and Power Company, amounting to $3,660.93, were given, I think, about a year ago. They have been renewed. The Penn Yan Elec-
44 tric Light and Power Company got the benefit of them, I think. Russell & Birkett may have gotten some of it. I don't know that there was any consideration for them.

This note to Roselle Russell, dated March 30, 1898, was a renewal note. The original note was given ten years ago, I think. It
45 was originally for about $10,000. It was contracted shortly after the time when we first went into business. In 1892 she loaned $10,000 more, and the rest is made up of interest. The note of March 30, 1898, is simply a renewal of the others. We took them up annually, and gave a new note. Every year we renewed them and added the interest and gave a new note. Roselle Russell is the wife of Calvin Russell.

Cora Russell is the wife of Henry Russell, 2d, who is a member of the firm of Russell & Son. This note, dated March 8, 1898, running to Cora Russell, for $4,010.10, was originally given to Henry Russell, 2d, in 1892 or 1893. It was for cash we received from him. I cannot tell when he transferred it to Cora Russell. It has been renewed once since that time. The debt was contracted in 1893, and has been standing, either in the name of Cora Russell or in the name of Henry Russell, ever since.

Mabel Russell is the daughter of Calvin Russell. The note given to her amounted to $1,408.07. It was contracted at the same time as Henry Russell's, in 1893. The amount represents a loan made about that time. It has been standing in her name ever since.

We owe the First National Bank of Wellsboro, Pa., quite a large sum for loans and discounts. That represents customers' paper. We have been doing business with that bank since 1893. We have had a line of customers' paper discounted there ever since. I cannot say how much it would run, but I think it is about the normal amount. My recollection is that we have had about $30,000 there for the past six or seven years. I think possibly it has been as low at times as $10,000. I don't think it has been below that. I think it has been as high as $60,000.

We have also had a line of discounts in the same manner
46 with the First National Bank of Penn Yan. That would run from $5,000 to $15,000.

The business has not been very profitable so far this year. It has been unprofitable for some time, for two or three or four years. We were hoping it would get better. I don't think we made any money at all last year. We lost, if you wouldn't call our betterments of our plant, improvements to our plant, which were very expensive last year—if you charge them up to expense, we lost. I don't know as we lost from business, if you call them an asset. We first decided to file a petition in bankruptcy on the evening of April 8, 1899. On the evening of Friday, the 7th, we were called up on the long distance telephone from New York by Mr. Jaretski. He represented Bulsing & Heslenfeld. They had a very large bill against us for non-fulfillment of contract, about $20,000. We had a fire on March 10, 1899. Mr. Russell was in the office at the time of this telephone talk, and I told him then. I thought the market might probably get in such shape that before the end of March we would be able to fill the contract. Before March 10th I knew the market was going against us. I told him at the time of that message from Mr. Jaretski, so we concluded Saturday, April 8th, that we would see our attorney, Mr. Carmody. We had never discussed the idea of suspending before that. We did not realize particularly that unless the market changed we would have to suspend. We thought we might make some arrangement with these people, and go on. We hoped to make an extension; that was my idea. I did not know on March 10th that unless that did occur we would have to make an arrangement with our creditors or suspend. I did not, most emphatically. I did not believe that. We had a liquidated contract
with Powers, Son & Company, of New York, and we had
47 these contracts for Bulsing & Heslenfeld, which were, of course, a matter of considerable worriment to us. We always had a great many contracts out.

This indebtedness to Henry Russell started almost from the time we commenced doing business. He had been endorser on our notes, and has furnished us money. I never told Dun and Bradstreet what we were worth.

Plaintiffs rested.

Mr. CARMODY:

If the Court please, I move for a non-suit, upon the grounds that plaintiffs have failed to make out a cause of action.

First.—There is no evidence that any statement made by Russell & Birkett to either of the commercial agencies was seen by or known to the plaintiffs at any time.

Second.—That the ratings in Dun and Bradstreet's commercial agencies were not based upon any statements made by Russell & Birkett, or by the defendants, and—

Third.—That there is no evidence showing that any statement made by the defendant- was false.

Fourth.—That the plaintiffs did not rely upon any statement made by Russell & Birkett in making the sales.

Motion denied. Exception.

Mr. CARMODY:

I desire to offer in evidence a certified copy of the adjudication in bankruptcy, dated April 15, 1899, issued to Russell & Birkett, as copartners, and Calvin Russell and Clarence T. Birkett, individually, out of the District Court of the United States, Northern District of New York, which bears the certificate of the Clerk of the
47½ Court.

Received and marked "Defendants' Exhibit 1."

Mr. CARMODY:

I offer in evidence the discharge of Russell & Birkett as co-partners and Clarence T. Birkett and Calvin Russell individually, issued out of the United States Court, Northern District of New York, on the 12th day of September, 1899, bearing the certificate of the Clerk of the Court, dated the 24th day of November, 1899.

Received and marked "Defendants' Exhibit 2."

CLARENCE T. BIRKETT, sworn for defendant, testified as follows:

To Mr. CARMODY:

I am the defendant. Mr. Russell, my partner, and myself, were adjudicated bankrupts on April 15, 1899, and discharged September 12, 1899. I had charge mostly in the bankruptcy proceedings of mailing notices to creditors. This notice shown me is the notice sent out to all the creditors, addressed to all on the mailing list, all creditors who appeared upon our schedules. Tindle & Jackson appeared as a creditor, and this claim sued upon here was that claim set forth in our schedules. There is a small difference in the amount sued upon here and the scheduled amount, made up of freight. We bought the goods delivered, and in their claim they did not allow for the freight. This is a copy of the notice mailed to Tindle & Jackson about the date of it, April 17, 1899.

Mr. CARMODY:

I offer that in evidence.

Received and marked "Defendant/s Exhibit 3."

This other notice of our application for discharge was also
48 mailed to Tindle & Jackson, the plaintiffs, about the date of it.

Mr. CARMODY:

I offer that in evidence.

Received and marked "Defendant's Exhibit 4."

At the time when I sent in this statement of September 16, 1897, referred to here, to Dun & Co., this $95,000 mortgage referred to here as collateral security to a mortgage given to secure the bonds of the Penn Yan Electric Light Company, and covering property of Russell & Birkett, had been mentioned by me to the agency prior to the making of the statement. I talked it over shortly after the mortgage became a matter of record with Mr. Lunt, I think was his name, of Bradstreet's. I talked it over with him two or three times, also with Dun's representative. I talked it over at the time it was given. I don't know as it was ever afterwards mentioned to any representative of these agencies by me. On October 2, 1897, the property of the Penn Yan Electric Light and Power Company consisted of dynamos, twenty-one coils of copper wire strung on poles, and the general personal property connected with a plant of that kind, and their franchise for lighting the village of Penn Yan. I don't know as they had any real estate, but they had certain power rights in the Seneca paper mill; water rights. We executed a mortgage, in 1892, I think; as collateral security to a mortgage
49 that existed upon the indebtedness against the Electric Light and Power Company. That mortgage was given on the 4th day of September, 1893, and it covered the property of Russell & Birkett. At the time this mortgage was given, Russell & Birkett were not indebted to the Penn Yan Electric Light and Power Company in any sum. I was not indebted to them. I was familiar with the property of the electric light company about January 1, 1892. I was present when the plant was constructed and the franchise was obtained, and knew of it. Was treasurer and vice-president of the company. I knew the cost of construction. The electric light property which I have enumerated just before was worth from $75,000 to $85,000. The other property covered by this $95,000 mortgage was the Seneca paper mills, complete paper mill, with a water power of 900 horse power and a modern equipment all through, and in first-class running order. Calvin Russell was operating it, making paper. The water power from that mill furnished the electric power. This mortgage given by the Electric Light and Power Company to John D. Parsons, in addition to the property, franchise and personal property of the electric light company, also covered the Seneca paper mill. I know what that mill cost and when it was constructed, in 1894, by Calvin Russell. He was the man in charge of the construction. The original cost was over $250,000. The paper mill alone, on the 1st of January, 1892, was worth $125,000, I should say. That is, in addition to the $75,000 for the electric light plant. Russell & Birkett, or I individually, never executed any other mortgages that were never mentioned in statements made to the commercial agencies, except these mortgages given as collateral security to the electric light mortgage of $95,000. These are the only
50 mortgages that were not mentioned. That mortgage mentioned in the statement made on the 20th of March, 1895,

and on September 16, 1897, was not mentioned by the agencies because the representatives told me they did not consider these firm liabilities; that they considered the property—Seneca mill and the Electric Light and Power Company property—sufficient. The representatives of Dun & Company and Bradstreet told me so. I considered that property sufficient to pay the indebtedness of the Penn Yan Electric Light and Power Company. When I made these statements I did not believe that the firm of Russell & Birkett would ever incur any liability upon those mortgages given as collateral to the $95,000 Electric Light and Power Company mortgage.

These notes here to Roselle Russell, Henry Russell, 2d, and Cora Russell, were given originally in 1892, I think. That money came from Mr. Calvin Russell, my partner, and was paid in and considered as his subscription to the capital stock. No interest was ever paid on that note up to the time we were adjudicated bankrupts. The entire amount originally borrowed, together with accumulated interest, was then due. No part of it had ever been paid. The Cora Russell note was considered by me as his subscription to the capital of the firm. No portion of it was paid, and it existed in the full amount, with accrued interest, at the time of the adjudication. Mabel Russell was a daughter of Calvin Russell, and her note was given in the same way, and no part of it was paid. There are no other notes except these three that were not mentioned in our statement to the commercial agencies. These notes were not mentioned for the reason it was agreed we never would—the firm would not—have to pay the money back; that they would remain his subscription to the capital of the business. No demand was ever made by Roselle
51 Russell, Henry Russell, 2d, or Mabel Russell, or anybody representing any of these notes that I have mentioned, for payment of principal or interest from Russell & Birkett from the time they were given until the time we failed.

No demand was ever made upon the firm of Russell & Birkett, that I know of, upon the bond and mortgage given to Henry Russell as collateral security to the Electric Light mortgage. No payment of interest or principal was ever made on it. No payment was ever made on it by Russell & Birkett at any time.

Henry Russell was a flour dealer at Albany. He is related to Calvin Russell. The firm of Russell & Birkett were dealing with Henry Russell. It was quite an extensive business. We were selling him flour and feed, and borrowed of him occasionally, and he occasionally endorsed our paper during the busy season. That indebtedness varied from time to time. It went all the way from $40,000 to nothing. He also endorsed and discounted notes for us. At the time this statement of September 16, 1897, was made, we owed Henry Russell practically nothing. We owed him nothing not represented in our statement of liabilities, or not included in the liabilities therein stated. At the time the statement of March 20, 1895, was made to Bradstreet, we owed Henry Russell nothing.
52 The kind of business of Russell & Birkett did not change from its start to finish. The firm became interested in the Penn Yan steam heating plant. That was a corporation, and our

firm owned the stock and ran it in connection with our mills, and had its revenues. In our statement the word "betterment" is meant to include equipment, that is, the general outfit for the transaction of the business, such as horses, trucks, bags, sacks, and the general equipment to carry on the milling business. The equipment, independent of the value of the mills, was worth $10,000 on September 16, 1897. On the 16th day of September, 1897, the firm of Russell & Birkett was worth "$152,858.22 over and above all liabilities." And in March, 1895, the firm was worth $152,000 in round numbers. Russell & Birkett became financially embarrassed about April 8, 1899. That was the culmination of it. We had met with losses before that. Our principal loss was occasioned by a number of contracts for buckwheat grain, flour, and buckwheat groats that we had sold for future shipment. The contracts were taken for a period extending from the 1st day of October up to the 31st day of March, for shipment ahead. We filled a number of these contracts at an enormous loss, aggregating about $35,000. Those contracts were filled during December, January, February, and March also. I can't state what proportion was filled in March. We filled the contracts as fast as we could make arrangements to. Some of them were bought in New York by us through brokers. The loss on our buckwheat contracts was occasioned this way: We had a great deal of this buckwheat bought of different dealers, a great number of whom defaulted on their contracts, and we had sold specific bushels, like what we term in trade lots, amounting to ten thousand bushels. It has to be delivered, every bushel of it, and we had bought
53 car lots around of different dealers. For instance, of one dealer we would buy five car lots, without a stipulation as to the bushels, and in a great many instances the car lots were delivered to us, but, instead of our getting the customary car lot of 750 to 900 bushels, we got car lots of 400 bushels, which at that time was the minimum car lot that could be delivered under contract. That was one source of our loss. The other occasion was there were a good many large firms in the same position we were. The crop of buckwheat abroad, we were informed by our foreign correspondents, was a great crop, and it was a good crop here, but it turned out the foreign crop was almost a failure, entirely, so that they all came to America to buy this buckwheat up, and it was forced up to a very high price, way up above its value, simply cornered. In trying to fill contracts that we had agreed to fill, shipments between October and March, at the prices that we agreed to ship, we lost $35,000, approximately. There was a good deal more lost, but those were the losses we assumed. Those were liquidated and paid. There were a great many more losses that were not paid, losses on our buckwheat contracts during that period. There was a very large balance on defaulted contract with Bulsing & Heslenfeld, of Amsterdam, Holland. There was about $20,000 due them. We lost on that contract. That is in addition to the $35,000 mentioned. That was the claim represented by Mr. Jaretski who appeared at Penn Yan about April 8, 1899. On the evening of April 6th, Mr. Jaretski called me up on the long distance telephone at New York, and said he represented Bulsing &

Heslenfeld, of Holland, and that we had defaulted on a contract with them, and he insisted on immediate payment. He wanted me to come down. I said I could not, I was busy. He says "I
54 am coming with Mr. Bulsing (he had come on from Amsterdam) to Penn Yan Monday morning, and we will insist on a settlement." Mr. Russell was in the office at the time, and I told him the conversation, so we concluded to adjourn to Mr. Huson's office that evening, to decide on the course we would take, and we went over the ground and decided on the course. The immediate cause of our closing at that time was this $20,000 claim represented by Mr. Jaretski, upon which he threatened proceedings. He represented another defaulted claim, of Power, Son & Co., of New York. That was about $10,000. Another contract upon which we defaulted, and which was not paid, was with Behren & Bodenheimer, at Hamburg, Germany, of about $5,000. Another was with Hegemeyer & Bruen, a foreign export house, for about $4,000. Those losses that were not paid, arising from buckwheat contracts, aggregate $60,000. Those are in addition to the $35,000 that we paid.

Russell & Birkett were large borrowers during their business, at times, from banks. In March, 1899, we were not able to borrow the necessary money to meet these demands upon us, growing out of loss on buckwheat contracts. At the time we closed we considered it impossible to raise the necessary money to meet these demands. Not one of these demands that afterwards made it necessary for us to close existed on November 2, 1898. None of them existed prior to the winter—January 1, 1899. Prior to the 8th of April, 1899, the firm of Russell & Birkett was contemplating a continuation of their business. I did not believe, up to that time, that it would be necessary to suspend business on account of financial embarrassments. I believed we would be able to meet our obligations as they accrued.

We had been doing it until these buckwheat contracts came
55 upon us. We had been paying for our merchandise and notes, certainly, when they became due. No judgments were in existence against us, or suits for unpaid debts.

In addition to our milling business of selling flour, we conducted a general shipping business, shipped grain and farm produce of all kinds. Between the 1st of January, 1898, and the 1st of January, 1899, the sales of our mill products were $382,709.63. The year before it was $354,235.21, and, the year before that, $266,181.61. The year before that $235,814.20. That was in 1895. In 1894 it was $197,579.63. In 1893 it was $210,449.07. From 1893 to 1898 our flouring business had increased in value of the output nearly one hundred per cent. It was done at a profit. The profit of 1898 was a trifle more than of 1897. It was $17,020.45 in 1898. That comes down to the 1st of January, 1899. For the year 1897 it was $16,-879.70. It only increased about $200 that year. In 1896 the profit was $9,350.10. In 1895 it was $15,504.07. In 1894 it was $7,-462.44.

During 1898, in connection with the expenses of our flour business, we advertised very extensively, and did a good deal of extra work; betterments. This time, and for two or three years previously, we

were engaged in putting up buckwheat flour in packages; "Puritan Buckwheat." We first engaged in that about 1895, and continued to the time of our failure. We advertised very extensively, and the cost of advertising increased. In 1898 it cost us $5,894.07 to advertise that brand of flour and get it on the market. In 1897 our gross amount of advertising cost $7,480.10.

During 1897 and 1898, in addition to our advertising, from the products of our business we built a new power house, a very expensive smoke stack, and increased the capacity of our mills largely.

56 The power house was built in 1896 and 1897, and its equipment, in the way of boilers and a new Corliss engine, cost about $20,000. That was paid for during 1896 and 1897. We also used our funds to put in a new steam heating plant, which was supplied with steam by boilers from the new power house put in, with pipes through the village, which helped them heat a large portion of the village of Penn Yan. That was during 1896 and 1897, and we invested in it about $26,000 or $27,000. That was a profitable investment. I have not a memoranda here of the revenues received annually from that.

In 1896 we also increased the capacity of our mills very largely, put in new and expensive machinery for milling purposes, and built a large addition to our A mill on the south portion of the main building on the south. The expenses, outlay on the mill property, during those two years, would average at least $7,000. It would be about $7,000 a year for the three years, 1896, 1897 and 1898.

We had a shipping department also, which was run separate from our milling business, and under a separate management, but I had the supervision of it. We had a manager who had charge of the shipping. That has been since 1888, but we put in a different head in 1893. It was a shipping business of grain, flour, feed, and farm produce. We would buy stuff, usually in solid car lots on track, and ship it direct to our customers in New England and New Jersey, and mostly to eastern points. And in the fall we purchase- a good many apples, cabbage and other produce, and shipped them west and south. That branch of our business was increasing. In the first eight months of 1893 the gross sales were $59,801.81; in 1894, $117,171.31; in 1895, $228,705.98; in 1896, $266,237.69; in 1897, $407,313.76; in 1898, $503,665.99. That comes up to Janu-

57 ary 1, 1899. On the 2d of November, 1898, our business was large, increasing and profitable.

We dealt first with Thomas Tindle, before the firm of Tindle & Jackson was organized. We commenced dealing with them when we opened our cooperage shop, in 1893. From that time down to the suspension we bought nearly all the stuff we used in that line of them. Our business increased yearly, and the demand for more stock increased, which accounts for the difference in sales from year to year. As I remember it, our terms with Tindle & Jackson were usually thirty days, with the customary discount of one per cent. off for cash in ten days. At times we gave them notes or they accepted time drafts, and all were paid when they became due.

Cross-examination to Mr. GIBBONS:

These figures are derived from my books. Some of the slips are in my handwriting. I took them from the books myself, with the assistance of my bookkeeper, who has been with me for about thirteen years. I did not keep the books, but I had the supervision of them, looking them over, looking at entries, and that sort of thing. These figures I took from the books he kept. All this writing is in my handwriting, but the figures are not on these slips. The other slips are entirely in the handwriting of my bookkeeper, but I helped him draw them off. The same bookkeeper kept the books during all of these years, every bit of them, for the whole time. I arrived at the profits of 1898 by taking the cost of merchandise and taking the sales, added the footings there were paid, the expenses that would properly be a charge against it for the manufacturing of it, and the other expenses that would go to make up, such as barrels, sacks and goods that went in, deducting the difference. I did not de-
58 duct from the gross sales the expense of putting in this steam-heating plant. I did not deduct from that the cost of this chimney. It had nothing to do with it. I did not deduct from the amount of sales the cost of putting in new machinery where the old had worn out. There was quite large items paid out in those years for new machinery and new work. We paid out on an average for 1896, 1897 and 1898 about $7,000 for betterments. In 1898, aside from the machinery, we added to our capacity, added to the general property a great deal, enlarging the buildings, increasing the capacity of the mills, and in the general equipment. In some of the years we probably used more money in replacing old machinery and enlarging the building, in erection of smoke-stack and putting in steam plant, than the total in profits were. I don't think we did for most every year for the last three or four years we were in business. In 1898 we put in new work $9,648.60, and our profits were $17,020.45, leaving a surplus of about $7,000. We also paid for advertising $5,894.07. There were large expenses that would naturally follow the conduct of the business, as for labor, sacks, bags and coal. They are charged up against the sales under the cost. One is costs and the other is avails of these items. In our expenses we have an item for each year headed "expense manufacturing." That is, "except repairs and betterments." In that item I have included the expense of manufacturing the articles and putting them on the market, and included clerk hire and labor, and traveling expenses, all of that. The only items we did not include are the advertising and the betterments, that is what we considered the permanent, lasting improvement to the plant. In 1897 these two items were $7,480 and $6,980, respectively, with the advertising out, and in 1896 they amounted to $3,645 and $2,840, respectively. For instance, toward
59 the latter part of 1896 we might have been doing some large, extensive work, but when the bills were paid they might come up in 1897, simply a matter of time. To my knowledge there is no other expense the firm of Russell & Birkett went to, aside from these items testified to, in 1898. The prices of cooperage material and such things, everything, is included, charged up to cost. I have

not added the expense of advertising and repairs to our works to the capital and trade. I charged it up to expense. Every item is charged up to expense. We never kept any construction account at all, as many large firms do when they build new buildings, put in new machinery, etc., and charge it to construction. We charged everything up to expense. When I made any estimates on the value of the property I took into consideration the improvements. I figured the plant at a certain sum before I put in the steam plant, but I did not then add the cost of the steam plant to the mill. I added what I considered proper. I don't remember what it was. The steam plant cost in the neighborhood of $30,000. I took that into consideration in estimating the value of the property. I don't remember exactly the figures I added. I will say I probably added $20,000. The mortgage dated January 1, 1892, offered in evidence, is the one, I think, I told the representatives of Dun and Bradstreet about. I discussed it with them. I think something was said about the record, but I don't remember what. They wanted to know what it was. There was only one piece of property, but the real estate originally was owned by different farmers, and so there are several descriptions in the mortgage. I recognize this paper entitled "Russell & Birkett, copartners, and personal liabilities." This is the mailing list
60 of the creditors. From this list the notices were sent to creditors of the first meeting and of the application for our discharge. The name of Tindle & Jackson appears on this list twice.

Mr. CARMODY:

If the Court please, I offer in evidence this mailing list, from which notices were sent of the first meeting of creditors, and also the application for discharge.

By the COURT:

Q. You say you mailed from this list?

A. Yes, sir. I supervised the mailing from the list. I read the names off to the stenographer, who copied them on the typewriter, and checked them off and noticed the check marks on the sides.

Paper received in evidence.

Defendant rests.

DEFENDANT'S EXHIBIT 1.

Adjudication in Bankruptcy, Entitled "In Bankruptcy, No. 942."

In the District Court of the United States for the Northern District of New York.

In the Matter of RUSSELL & BIRKETT, Co-partners, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

Said exhibit is in substance as follows:

At Utica, N. Y., in said district, on April 15, 1899, before Hon. Alfred C. Coxe, Judge of said Court in Bankruptcy, the petition

of the above-named bankrupts having been heard and duly
61 considered, the said Russell & Birkett, copartners, and Calvin Russell and Clarence T. Birkett, individually, were thereby declared and adjudged bankrupts accordingly.

Dated and sealed with seal of said court on April 15, 1899.

[redacted]

DEFENDANT'S EXHIBIT 2.

Discharge in Bankruptcy.

Same title as Exhibit 1, and in substance as follows:

Calvin Russell and Clarence T. Birkett, as copartners and individually, having been duly adjudged bankrupts, and conformed to all the requirements of law, etc., it is

"Ordered, by the Court, That said Calvin Russell and Clarence T. Birkett, as copartners under the firm name of Russel- & Birkett, and Calvin Russell and Clarence T. Birkett, individually, be forever discharged from all debts as copartners and as individuals, and claims which by said Act are made provable against their estate, and which existed on the 13th day of April, 1899, on which day the petition for adjudication was filed, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at the city of Utica, N. Y., in said district, this 12th day of September, A. D., 1899.

[L. S.] A. C. COXE, *Judge.*

Attest:

CHARLES B. GERMAIN, *Clerk.*"

DEFENDANT'S EXHIBIT 3.

Notice of First Meeting of Creditors.

Same title as Exhibit 1, and in substance as follows:

"Notice is hereby given that on April 15, 1899, Russell &
62 Birkett, as co-partners, etc., were duly adjudged bankrupts, and that the first meeting of their creditors will be held at the chambers of the County Judge, in the county Building, Penn Yan, N. Y., on the 2d day of May, 1899, at 10 o'clock A. M., at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated April 17, 1899.

CHARLES A. HAWLEY,
Referee in Bankruptcy."

DEFENDANT'S EXHIBIT 4.

Notice of Application for Discharge.

Same title as Exhibit 1, and in substance as follows:

"On June 26, 1899, on reading the petitions of the above-named bankrupts, praying for a discharge from their debts, it is—

Ordered, by the Court, That a hearing be had upon the same on the 11th day of July, 1899, before said Court, at the city of Utica, N. Y., in said district, at 10 o'clock in the forenoon, and that notice thereof be published, etc., and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioners should not be granted. And it is further—

Ordered, That the Referee send by mail to all known creditors copies of this order, addressed to them at their places of residence as stated."

Dated and sealed with seal of said Court June 26, 1899.

63 THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs-Respondent-,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

COUNTY OF YATES, *ss:*

Thomas Carmody, being duly sworn, says he is the attorney for the defendant in the above-entitled action; that no opinion was given by the learned Justice before whom the case was tried in the court below.

THOMAS CARMODY.

Sworn to before me this 5th day of October, 1903.

KATHLEEN L. CAVISTON,
Notary Public.

The foregoing case contains all the evidence given herein.

THOMAS CARMODY,
Attorney for Defendant, Penn Yan, N. Y.

The foregoing case is hereby settled as above, and ordered filed. Dated December 7, 1903.

DANIEL J. KENEFICK,
Justice of the Supreme Court.

At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Depart-
64 ment, at the city of Rochester, commencing on the 8th day of March, 1904.

Present:—Hon. Peter B. McLennan, Presiding Justice. Hon. Alfred Spring, Hon. Pardon C. Williams, Hon. Frank H. Hiscock, Hon. Martin L. Stover, Associate Justices.

THOMAS TINDLE and Another, Respondents,
against
CLARENCE T. BIRKETT, Appellant.

The above-named Clarence T. Birkett, the appellant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court, and entered in the office of the Clerk of the county of Erie on the 4th day of September, 1903, and the said appeal having been submitted by Mr. Thomas Carmody, of counsel for the appellant, and having been argued by Mr. Frank Gibbons, of counsel for the respondent, and due deliberation having been had thereon, it is hereby—

Ordered and Adjudged, That the judgment so appealed from be, and the same is, hereby affirmed, and the respondent- recover of the appellant the costs of this appeal.

All concur.

Entered 29th day of March, 1904.

NEWELLL C. FULTON, *Clerk*.

65 Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs,
against
CLARENCE T. BIRKETT, Defendant.

The above-named defendant, Clarence T. Birkett, having appealed to the Appellate Division of the Supreme Court for the Fourth Judicial Department from the final judgment entered in this action in the office of the Clerk of the county of Erie on the 4th day of September, 1903, in favor of the plaintiffs and against the defendant, for the sum of seventeen hundred and fifty-five dollars and twenty-two cents ($1,755.22), damages and costs, and an order having been made by the said Appellate Division, at a term thereof commencing on the 8th day of March, 1904, and entered in the office of the Clerk thereof on the 29th day of March, 1904, and a certified copy of the said order, with the original case or papers upon which the appeal was heard, having been filed in the office of the Clerk of the county of Erie on the 4th day of April, 1904, directing that the judgment appealed from be affirmed, with costs of the appeal to the respondents, and the respondents' costs and disbursements on said appeal having been duly adjusted by the Clerk of the county of Erie at the sum of one hundred and four dollars and eighty-four cents ($104.84)—

Now, pursuant to the terms and conditions of the said order, and upon motion of Gibbons & Pottle, attorneys for the plaintiffs, it is hereby—

Adjudged, That the judgment so appealed from as aforesaid be, and the same is, hereby in all respects affirmed, and, further, that the said plaintiffs, Thomas Tindle and Willis K. Jackson, recover and have judgment against the said defendant, Clarence T. Birkett, for the sum of one hundred and four dollars and eighty-four cents ($104.84), for their costs and disbursements of the said appeal, and that they have execution therefor both against the property and the person of the said defendant. Judgment signed this 9th day of April, 1904.

C. W. CHAPIN, *Deputy Clerk.*

66

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Respondents,
against
CLARENCE T. BIRKETT, Appellant.

Notice of Appeal to the Court of Appeals.

Take notice that the above-named defendant, Clarence T. Birkett, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Fourth Judicial Department, in this action, entered in the office of the Clerk of said Court on the 29th day of March, 1904, and from the judgment of this Court duly entered herein in Erie County Clerk's office on the 9th day of April, 1904, for the sum of $104.84 costs, and affirming the judgment of Erie Supreme Court in favor of the plaintiffs and against the defendant, for the sum of $1,755.22, damages and costs, which judgment was entered in Erie county on the 4th day of September, 1903, and from each and every part of said judgment and order.

Dated Penn Yan, N. Y., April 26, 1904.

Yours, &c.,

THOMAS CARMODY,
Attorney for Defendant-Appellant,
Penn Yan, N. Y.

67

To the Clerk of Erie County and to Messrs. Gibbons & Pottle, Attorneys for Plaintiffs-Respondents, Buffalo, N. Y.

THOMAS TINDLE and WILLIS K. JACKSON,
Plaintiffs-Respondents,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

COUNTY OF YATES, *ss:*

Thomas Carmody, being duly sworn, says he is the attorney for the defendant-appellant in the above entitled action, and that no opinion was written by the Appellate Division upon the decision of the appeal herein in that court.

THOMAS CARMODY.

Sworn to before me this 14th day of May, 1904.
KATHLEEN L. CAVISTON,
Notary Public.

It is hereby stipulated, by and between the attorneys for the respective parties herein, that the foregoing are true and correct copies, and of the whole thereof, of the case and exceptions herein, and that the same may be used upon the appeal herein to the Court of Appeals with the same force and effect as if certified by the Clerk of Erie County, such certification being hereby expressly waived.
Dated May 16, 1904.

GIBBONS & POTTLE,
Attorneys for Plaintiffs.
THOMAS CARMODY,
Attorney for Defendant.

68 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 5th day of December, in the year of our Lord one thousand nine hundred and five, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, Presiding.
W. H. SHANKLAND, *Clerk.*

Amended Remittitur, January 24th, 1906.

THOMAS TINDLE & ANO., Respondents,
against
CLARENCE T. BIRKETT, Appellant.

Be it remembered, That on the 18th day of August, in the year of our Lord one thousand nine hundred and four, Clarence T. Birkett, the appellant in this action, came here into the Court of Appeals by Thomas Carmody, his attorney, and filed in the said Court a notice of appeal and return thereto from the Order and judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Thomas Tindle and ano., the respondents in said action, afterwards appeared in said Court of Appeals by Gibbons & Pottle, their attorneys.

69 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John H. Gleason, of counsel for the Appellant, and By Mr. Frank Gibbons, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division and Trial Term of the Supreme Court appealed from herein be and the same hereby are reversed and complaint dismissed with costs in all courts to appellant.

This judgment is rendered solely upon the ground that the discharge in bankruptcy granted by the United States District Court for the Northern District of New York, on the 12th day of September, 1899, pursuant to an Act of Congress entitled: An act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898," is a bar to the prosecution of an action to recover upon any of the causes of action alleged in the complaint, the decision of the trial court having been examined and having been found to be correct in all other respects.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, It is considered that the said judgments be reversed, &c., &c., as aforesaid.

70 And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *January 24th*, 1906.

I hereby certify That the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

71 Court of Appeals.

THOMAS TINDLE ET AL., Respondents,
vs.
CLARENCE T. BIRKETT, Appellant.

Tindle *v.* Birkett, 93 App. Div. 606, reversed.

(Argued November 24, 1905; decided December 5, 1905.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 9, 1904, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

John H. Gleason and Thomas Carmody for appellant.

Frank Gibbons for Respondents.

WERNER, *J.:*

This action was brought to recover damages which the plaintiffs claim to have sustained in consequence of specified false and fraudu-

lent representations, alleged to have been made by the firm of which the defendant is the survivor, to the representatives of two mercantile agencies, concerning the assets and financial responsibility of that firm, upon the strength of which these mercantile agencies issued reports by which the plaintiffs say they were deceived into selling defendant's firm goods which they would not otherwise have sold to it. The general question whether such representations, when properly proved, established a cause of action for fraud and deceit was decided in favor of plaintiffs upon a former appeal to this court. (171 N. Y. 520.) Since then the case has been retried, and a judgment for the plaintiffs, entered at the Trial Term, has been unanimously affirmed in the Appellate Division.

72

One of the defenses interposed by the defendant to the plaintiffs' claim was, that it had been barred by a discharge in bankruptcy proceedings which had been instituted against defendant's firm and prosecuted to a final adjudication, resulting in a discharge from all debts save such as are by law excepted from the operation of a discharge in bankruptcy. The issue thus joined by this plea of the defendant was met by the rejoinder of the plaintiffs to the effect that their cause of action was not one which could be discharged in bankruptcy proceedings. As the decision upon this issue depends wholly upon the construction of the statute familiarly known as the Bankruptcy Act of 1898, a question of law is presented which survives the unanimous affirmance below and is reviewable upon this appeal.

The section (17) of that act which covers the case here presented provides that "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * 2. Are judgments in actions for fraud, or obtaining property by false pretenses, or false representations, or for wilful or malicious injuries to the person or property of another * * * 4. Were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

73

Since the debt upon which the claim of the plaintiffs is founded clearly falls within the category of provable debts enumerated in section 63a of the Bankruptcy Act, it is quite as clearly covered by the discharge in bankruptcy unless the fact that the debt originated in fraud excludes it from the operation of the discharge. If it were an open question whether debts of this class are included in or excluded from the debtor's discharge in bankruptcy, the very interesting brief of counsel for the respondents would furnish much material for discussion. But the question has been finally and authoritatively decided by the Supreme Court of the United States in the case of Crawford *v.* Burke (195 U. S. 176), and that decision we must follow regardless of any differences of opinion that might otherwise have obtained.

That was an action in trover, instituted in the State of Illinois, to recover damages for the fraudulent conversion of certain shares of stock. The defendants pleaded their discharge in bankruptcy. Notwithstanding this plea the plaintiffs recovered a judgment which was affirmed by the Supreme Court of Illinois, and thereafter re-

versed by the Supreme Court of the United States. The latter court held that Burke's claim against Crawford and Valentine, although sounding in tort, was one "founded upon an open account, or upon a contract express or implied," and might have been proved under section 63, subdivision a, of the Bankruptcy Act, if Burke
74 had chosen to waive the tort and take his place with the other creditors of the estate.

By the mandate of section 17, above referred to, a discharge in bankruptcy relieves the bankrupt from all his provable debts, except (2) judgments in actions for frauds, or obtaining money by false pretenses, or false representations, or for willful and malicious injuries to the property or person of another—(4) or such other debts as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity. In construing this language and determining its effect upon just such a situation as is presented in the case at bar, the Federal Supreme Court said: "The fact that the second subdivision of section 17 excepted from the discharge 'all judgments in actions for frauds, or of obtaining property by false pretenses, or false representations, indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting *as an officer or in a fiduciary capacity*. Unless these words relate back to all the preceding words of the (4th) subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from
75 discharge by subdivision 4, whether judgment had been obtained or not. * * * The contention that 'fraud' should be segregated from the qualifying language 'while acting as an officer or in any fiduciary capacity' is without merit. Such interpretation would not only destroy the grammatical construction of the sentences and contravene their plain meaning, but it would likewise be inconsistent with paragraph 2 of the same section—that a creditor should have obtained judgment in an action for fraud in order to override a discharge in bankruptcy. * * * If any debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute. * * * Why an ordinary claim for fraud should be released by the discharge, while a judgment for fraud is not released, is not altogether clear, although this distinction may have been created to avoid the necessity of going into conflicting evidence upon the subject; while in cases of judgments for fraud the judgment itself would be evidence of the fraudulent character of the claim. If a creditor has a claim against a debtor for goods sold, which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased under a misrepresentation of the assets

of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy. It was probably this contingency which induced Congress to enact that an alleged fraud of this kind should be reduced to judgment before it could be set up in bar of a discharge."

Much more might be quoted from exhaustive opinion in
76 Crawford *v.* Burke to show the reasons for the conclusion reached, but we have extracted enough therefrom to clearly indicate that the precise question here involved was there decided.

It follows, therefore, that Frey *v.* Torrey (70 App. Div. 166; affd., 175 N. Y. 501) must be considered as overruled; the judgment herein of the courts below must be reversed, and the complaint dismissed, with costs to the appellant in all courts.

Cullen, Ch. J., Gray, O'Brien, Bartlett, Haight and Vann, JJ., concur.

Judgment reversed, etc.

77 At a Special Term of the Supreme Court, held at the City and County Hall, in the City of Buffalo, in and for the Eighth Judicial District of the state of New York, on the 5th day of February, 1906.

Present: Hon. John S. Lambert, Justice Presiding.

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON
against
CLARENCE T. BIRKETT.

The above named defendant having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Fourth Department, entered in this action on the 9th day of April, 1904, in the office of the Clerk of Erie County, affirming the judgment entered in said office on September 4, 1903, and the Court of Appeals having heard said appeal and the amended remittitur therefrom having been filed in said clerk's office on January 25th, 1906, and the plaintiffs now appearing by Frank Gibbons, Esq., their counsel and the defendant by Harry B. Lamson, Esq., his counsel, now, therefore, upon motion of said counsel for said defendant and pursuant to said amended remittitur, it is hereby

78 Ordered That the judgment of the Court of Appeals be and the same is hereby made the judgment of this court and that the judgment herein entered on the fourth day of September, 1903, and the judgment entered on the 9th day of April, 1904, be reversed and the complaint herein be dismissed with costs of said appeal to the defendant against the plaintiffs in all courts to be taxed, solely upon the ground that the discharge in bankruptcy granted by the United States District Court for the Northern District of New York, on the 12th day of September, 1899, pursuant to an Act of Congress entitled: An act to establish a uniform system of bankruptcy through-

out the United States, approved July 1, 1898," is a bar to the prosecution of an action to recover upon any of the causes of action alleged in the complaint, the decision of the trial court having been examined and having been found to be correct in all other respects.

Granted.

Feb. 5, 1906.

PERRY E. WURST,
Sp. Dep. Clerk.

79 Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON
against
CLARENCE T. BIRKETT.

The above named defendant having appealed to the Court of Appeals from a judgment of the Appellate Division of the Supreme Court for the Fourth Department, entered in this action, on the ninth day of April, 1904, which judgment affirmed a judgment entered herein on the 4th day of September, 1903, after trial of the issues, both of which judgments were entered on above dates in Erie County Clerk's office, and the Court of Appeals having heard the said appeal, and having ordered and adjudged that the judgments so appealed from be reversed and the complaint herein be dismissed, and judgment rendered for the defendant with costs to the defendant in all the courts against the plaintiffs, and the amended remittitur from the said Court of Appeals having been filed in the office of the Clerk of the County of Erie on the 25th day of January, 1906, and an order having been made at a Special Term of the Supreme Court, on the fifth day of February, 1906, directing that the judgment of the Court of Appeals be made the judgment of this Court, which order was on that day entered in the office of the clerk of the County of Erie, and the costs of the said defendant having been duly adjusted at the sum of five hundred and nineteen dollars and thirty-five cents ($519.35),

80 Now, Therefore, On motion of Thomas Carmody, attorney for the defendant, and pursuant to the said order and amended remittitur, it is

Adjudged That the judgment in this action, entered in the office of the Clerk of the County of Erie on the fourth day of September, 1903, and also the judgment entered herein in said office on the ninth day of April, 1904, be and the same are hereby each reversed, and the complaint in this action is hereby dismissed, solely upon the ground that the discharge in bankruptcy granted by the United States District Court for the Northern District of New York, on the 12th day of September, 1899, pursuant to an Act of Congress, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1, 1898" is a bar to the prosecution of an action to recover on any of the causes of action alleged in the complaint, the decision of the trial court having been examined and having been found to be correct in all other respects, and it is

Further Adjudged, That the defendant recover of the plaintiffs Thomas Tindle and Willis K. Jackson the sum of five hundred and nineteen dollars and thirty-five cents ($519.35) the amount of his costs herein as taxed, and that he have execution therefor both against the property and against the persons of the said plaintiffs.

Judgment signed this 10th day of February, 1906.

C. W. CHAPIN,
Dep. Clerk.

81 United States Supreme Court.

THOMAS TINDLE and WILLIS K. JACKSON, Plaintiffs in Error,
against
CLARENCE T. BIRKETT, Defendant in Error.

It is hereby stipulated by and between the counsel for the respective parties to this case, that the Clerk of the County of Erie in his capacity as Clerk of the Supreme Court of the State of New York, when he makes his return to the writ of error issued herein on February 12, 1906, shall transmit the foregoing portion of the record as a transcript of the record herein, omitting all other parts thereof as immaterial to the determination of any question before this Court, and the same shall for all purposes be treated and regarded as a complete transcript of said record.

Dated March 1, 1906.

FRANK GIBBONS
Counsel for Plaintiffs in Error.
THOMAS CARMODY,
Counsel for Defendant in Error.

82 STATE OF NEW YORK, *County of Erie, ss:*

I, John H. Price, Clerk of the County of Erie, New York, and *ex-officio* Clerk of the Supreme Court of said state therein, do hereby certify the foregoing to be a true, full and complete transcript of the record of said Court in the cause named at the beginning thereof, including the opinion of the Court of Appeals of said state upon the rendition of its decision, excepting only such portions thereof as is excluded by the foregoing stipulation, dated March 1, 1906.

In witness whereof, I have hereunto set my hand and the seal of said County and of said Court at Buffalo, this 7th day of March, 1906.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE,
Clerk of the Said County and of the Supreme Court Therein.

83 STATE OF NEW YORK:

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Respondents,
against
CLARENCE T. BIRKETT, Appellant.

The plaintiffs and respondents above named, Thomas Tindle and Willis K. Jackson, herewith file their petition for a writ of error in this action, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment of errors:

1. The Court of Appeals, pursuant to whose direction this court granted and entered the final judgment so complained of, did err, and this Court when it followed the direction of the said Court of Appeals also erred in that it did order and adjudge that the judgments of the Appellate Division and of the Trial Term of the Supreme Court of the State of New York, reviewed by the Court of Appeals and referred to in the final judgment aforesaid, should be and that the same were reversed and the complaint dismissed with costs in all courts to the appellant in the following respects: The Court of Appeals and this court, pursuant to its direction, held and decided that each of the causes of action set forth in the com-
84 plaint and upon which the original judgment of this court was given, were each barred by reason of a discharge in bankruptcy obtained by the defendant from the United States District Court for the Northern District of New York, on the 12th day of September, 1899.

2. The said Court of Appeals and this court when it acted pursuant to the direction of that court, also erred in that it refused to affirm the judgments aforesaid, for the reason that none of the said causes of action were discharged by reason of the said discharge in bankruptcy so granted as aforesaid.

The said errors are more particularly set forth as follows:—

1. The Court of Appeals and this Court when it followed its direction, held and decided that each of the causes of action alleged in the complaint were provable debts enumerated in Section 63*a* of the Act of Congress, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1, 1898, whereas the decision should have been that none of the said debts were provable debts within the meaning of said section.

2. The said Court of Appeals and this Court when it followed the direction thereof, also erred when it held and decided that the said several causes of action were not contained within the exceptions from provable debts enumerated in the said section 63*a*, dischargeable by the terms of the said act as contained in Section 17 of the said act.

The effect of both and of each of the said errors being to de-
85 prive the plaintiffs of the right to enforce their claims and demands against the defendant, as plaintiffs claim they have a right to do under the terms and conditions of the said statute.

For which errors the plaintiffs, Thomas Tindle and Willis K. Jackson, pray that the judgment of the Court of Appeals of the State of New York and of the Supreme Court of the State of New York, rendered pursuant to the direction of the aforesaid Court of Appeals, granted and entered in the office of the Clerk of the County of Erie, New York, on February 1906, be reversed, and that a judgment be entered for the plaintiffs, with costs.

GIBBONS & POTTLE,
Attorneys for the Plaintiffs and Respondents, 5 Erie County Savings Bank Bldg., Buffalo, N. Y.

86 STATE OF NEW YORK:

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Respondents,
against
CLARENCE T. BIRKETT, Appellant.

Considering themselves aggrieved by the final decision and judgment of the Supreme Court of the State of New York, rendered pursuant to the direction and remittitur from the Court of Appeals of the State of New York, the plaintiffs and respondents hereby pray that a writ of error from the said decision and judgment to the Supreme Court of the United States may issue. Their assignment of errors is presented herewith.

GIBBONS & POTTLE,
Attorneys for the Plaintiffs and Respondents, 5 Erie County Savings Bank Bldg., Buffalo, N. Y.

STATE OF NEW YORK, *Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by Thomas Tindle and Willis K. Jackson, the plaintiffs and respondents, in the sum of $1500, said bond, when approved, to act as a supersedeas.

Dated February 12, 1906.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Supreme Court of the State of New York and the Justices thereof, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment in a plea, which is in the Supreme Court of the State of New York, granted and entered in Erie County, before you, or some of you, pursuant to an amended remittitur from the Court of Appeals of the State of New York in accordance with its decision rendered December 5, 1905, being the highest court of law or equity of the said State of New York, in which a decision could be had in the said suit, between Thomas Tindle and Willis K. Jackson, plaintiffs and respondents, and Clarence T. Birkett, defendant and appel-

lant, (said amended remittitur having been filed in the office of the Clerk of the County of Erie, New York, on January 25, 1906, and said judgment having been entered therein pursuant thereto on the 10th day of February, 1906,) wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute, a manifest error hath happened to the great damage of the plaintiffs and respondents, Thomas Tindle and Willis K. Jackson, as by their petition and complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties afore-
87½ said in this behalf, do command you, if judgment therein be given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourteenth day of March, 1906, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to corect that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of February, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the United States Supreme Court.

Allowed.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

[Endorsed:] Supreme Court. Thomas Tindle *et al. vs.* Clarence T. Birkett. Writ of Error. Filed Erie County, Clerk's Office, Feb. 13, 1906. 22/570.

88 STATE OF NEW YORK, *County of Erie, ss:*

The original of the foregoing Writ of Error was lodged with the Clerk of the County of Erie, New York, in his capacity as *ex-officio* clerk therein of the Supreme Court, of the State of New York, on February 13, 1906, and also at the same time and place, a copy thereof for the defendant, Clarence T. Birkett, duly addressed to him personally. The following endorsement was made upon the said original writ and upon each copy: "Writ of Error Filed February 13, 1906."

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE,
Clerk of Said County and of the Supreme Court Therein.

89 STATE OF NEW YORK:

Supreme Court, Erie County.

THOMAS TINDLE and WILLIS K. JACKSON, Respondents,
against
CLARENCE T. BIRKETT, Appellant.

Know all men by these presents that We, George A. Jackson, residing in the city of Buffalo, County of Erie, and State of New York, and John H. Meath, residing in the city of Buffalo, County of Erie, and State of New York, are held and firmly bound unto Clarence T. Birkett in the full and just sum of fifteen hundred dollars ($1500.00), to be paid to the said Clarence T. Birkett, his certain attorney, administrator or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this tenth day of February, in the year of our Lord, one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the State of New York, in a suit pending therein, between Thomas Tindle and Willis K. Jackson, plaintiffs and respondents, and Clarence T. Birkett,
90 defendant and appellant, final judgment was rendered against the said Thomas Tindle and Willis K. Jackson, which reversed the judgments theretofore rendered in said action by the Trial Term and the Appellate Division of the Supreme Court of the State of New York, and directed that the complaint be dismissed with costs to the defendant and appellant in all courts.

And, whereas, Upon the remittitur from the said Court of Appeals to it directed, the Supreme Court of the State of New York has rendered final judgment to that effect, and its judgment has been entered in the office of the Clerk of the County of Erie, New York, pursuant thereto, and awarding the defendant costs to the amount of $519.00.

And, whereas, The said plaintiffs and respondents have applied for or are about to apply for a writ of error to the Supreme Court of the United States, for a review of the said judgments,

Now, therefore, The condition of this obligation is such that if the above named plaintiffs, Thomas Tindle and Willis K. Jackson, the plaintiffs in error in said Supreme Court of the United States, shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged against them if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

GEORGE A. JACKSON. [L. S.]
JOHN H. MEATH. [L. S.]

91 STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

On this tenth day of February, 1906, before me, the subscriber, personally appeared George A. Jackson and John H. Meath, to me personally known and known to me to be the persons described in

and who executed the foregoing instrument, and they severally duly acknowledged to me that they had executed the same.

JOHN H. REICHLE, [L. S.]
Notary Public for Erie County, N. Y.

STATE OF NEW YORK, *County of Erie, City of Buffalo, ss:*

George A. Jackson and John H. Meath, being severally duly sworn, each for himself says: that he is a resident of and a freeholder within the state of New York and County of Erie, and is over the age of twenty-one years. That he is one of the sureties named in the foregoing bond and that he is reasonably worth the sum of three thousand dollars ($3000.) over and above all the debts and liabilities which he owes and has incurred, and exclusive of property exempt by law from levy and sale under execution.

GEORGE A. JACKSON.
JOHN H. MEATH.

Subscribed and sworn to before me this 10th day of February, 1906.

[L. S.] JOHN H. REICHLE,
Notary Public for Erie County, N. Y.

The foregoing bond is hereby approved and allowed as a supersedeas.

Dated February 12th, 1906.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

92 STATE OF NEW YORK, *County of Erie, ss:*

The original of the foregoing supersedeas bond was lodged with the Clerk of the County of Erie, New York, in his capacity as clerk *ex-officio* of the Supreme Court of said state therein on February 13, 1906, and the following endorsement made thereon: "Bond: Filed February 13, 1906."

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE,
Clerk of the Said County and of the Supreme Court Therein.

93 The President of United States of America to Clarence T. Birkett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourteenth day of March, pursuant to a writ of error filed in the Clerk's office of the County of Erie, State of New York (such clerk being *ex-officio* Clerk of the Supreme Court of the State of New York, in said county), wherein Thomas Tindle and Willis K. Jackson are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not

be corrected, and why speedy justice should not be done to parties in that behalf.

Witness, Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 12th day of February, 1906.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

I, Thomas Carmody, attorney of record for the defendant in error in the above mentioned case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

Dated, February 23rd, 1906.

THOMAS CARMODY,
Attorney for Defendant in Error.

94 STATE OF NEW YORK, *County of Erie, ss:*

In obedience to the commands of the within writ of error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case of Thomas Tindle, *et al.*, plaintiffs in error, against Clarence T. Birkett, defendant in error, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said County and of said Court therein, at Buffalo, this 7th day of March, 1906.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE,
Clerk of the Said County and of the Supreme Court Therein.

Endorsed on cover: File No. 20,120. New York supreme court. Term No. 217. Thomas Tindle and Willis K. Jackson, plaintiffs in error, *vs.* Clarence T. Birkett. Filed March 9th, 1906. File No. 20,120.

FILE COPY.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1906.

No. 217.

THOMAS TINDLE, et al, PLAINTIFFS IN ERROR,

vs.

CLARENCE T. BIRKETT, DEFENDANT IN ERROR.

Frank Gibbons, Counsel for Plaintiffs in Error, 5 Erie Co. Sav. Bank Bldg., Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 217.

THOMAS TINDLE, et al, Plaintiffs in Error,

vs.

CLARENCE T. BIRKETT, Defendant in Error.

ABSTRACT.

This action was brought in the Supreme Court of the State of New York and was twice tried therein.

The judgment of non-suit upon the first trial was reversed by the Court of Appeals of that State (171 N. Y. 520) and a new trial ordered. The second trial resulted in a judgment in favor of the plaintiffs therein, the plaintiffs in Error herein, and against the defendant in Error. Upon appeal to the Court of Appeals from that judgment the case was reversed a second time and judgment rendered dismissing the complaint upon the merits solely upon the ground that each and all of the several causes of action sued upon were released by a discharge in bankruptcy granted the defendant by the United States District Court for the Northern District of New York prior to the time of the commencement of the action.

Upon the remittitur from the Court of Appeals the Supreme Court of New York thus rendered and entered final judgment as directed. The plaintiffs thereupon sued out this writ of Error to that Court.

The complaint contains three counts. Each sets out a cause of action for damages for fraud and deceit alleged to have been practiced upon the plaintiffs in Er-

ror by the Defendant in Error on behalf of a co-partnership firm of which he is the sole survivor. (Page 1).

The answer denies the fraud and pleads the discharge in bankruptcy as an affirmative defense to each cause of action. (page 4). The trial court decided all questions in favor of the plaintiffs in Error. (page 6) The Court of Appeals left the decision of the trial court undisturbed upon the question of fraud. (Pages 39 and 40)

It dealt fully with that subject upon the first appeal where that was the only question in the record in the following forcible language:

"That the statements were grossly false and that the plaintiffs relied" upon them "are facts concerning which there is and can be no serious dispute. * * *" (171 N. Y. 523). The decision of the trial court may be found at page 6 of record.

SPECIFICATION OF ERRORS.

There is but one Error in the record which raises a Federal question. The Court of Appeals and the State Supreme Court in obedience to its mandate decided that each of the causes of action alleged in the complaint were released by a discharge in bankruptcy granted to the defendant in Error by the United States District Court for the Northern District of New York prior to the time of the commencement of the action and dismissed the complaint solely for that reason, whereas the dicision ought to have been that said discharge in bankruptcy did not release any of said causes of action. (Page 46)

BRIEF.

The only question for this court to consider is that of the effect of the discharge in bankruptcy. This involves a construction of sections 63 (a) and 17 of the bankruptcy act of 1898. The two sections read as follows:

"Sec. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds or obtaining property by false pretenses, or false representations or for wilful and malicious injuries to the person or property of another * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

"Sec. 63. Debts which may be proved:

(a). Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not * * * (4) founded upon an open account or upon a contract, express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge."

We are not concerned with section 63 (b) because the claims in question are all liquidated. If they were unliquidated but otherwise provable section 63 (b) prescribes the practice.

This court discussed these sections at some length in the case of Crawford vs. Burke, 195 U. S. 176.

The court of Appeals decided that thereby it had finally decided all questions involved.

Tindle vs. Birkett, 183 N. Y. 267. (Opinion may be found in record at page 40).

Notwithstanding all of this we have brought this case into this Court and respectfully ask its careful consideration for the following reasons:

1. Because this case is not within the principle involved in Crawford vs. Burke as the Court of Appeals decided it to be, but on the contrary that case clearly shows the way by which this one can be distinguished and a contrary and more just disposal made of it.

2. Because Crawford vs Burke when it construes section 17, subdivision 4, lays down a most unjust rule and almost every proposition there stated can be explained in such a way as to convince one of a contrary intent in congress from that ascribed. This involves simply a comparison of the new statute with the old as interpreted by contemporary courts.

Those decisions, thirty years dormant and useless, were not brought to the attention of this court when it decided the Crawford case; otherwise that decision must of necessity have been different. This alone would be enough to lead us to ask the Court to reexamine the question to see if an error had not been made.

It is important to the business community because large numbers of people who have been defrauded by such rascality as is here involved find themselves not only robbed of their property but also find that those

who robbed them are opulent in the open, notorious possession of it; And under an interpretation of that case, which is quite common, perfectly secure into the bargain. It is hard to believe that Congress ever intended to make that possible or that this court would construe a doubtful statute so as to give that effect if it could be avoided. The Court plainly saw this injustice. It said in the opinion at page 191, "Why an ordinary claim for fraud should be released by the discharge while a judgment for fraud is not released, is not altogether clear, &c."

With these preliminary remarks we invite the attention of the court to the specific points which we wish considered.

POINT I.

Section 17 of the Act provides that none but provable debts are released by a discharge. These debts are not provable debts and therefore are not released within the principles laid down in the second proposition of Crawford vs. Burke (page 193 of opinion).

That case is authority for the proposition that a debt "founded upon an open account or upon a contract, express or implied" is released regardless of the form of action in which the plaintiff may sue. (End of page 193 of opinion). It is summed up by these sentences "It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a. It results from the construction we have given the later section that all debts originating upon an account, or upon a contract, express or implied, are provable though the plaintiff elects to bring his action for fraud." The court continualy uses the expression "or-

iginates or is founded upon an open acount or upon a contract." "Founded upon" must be equivalent in meaning to "originates" both in common sense and from the way the expressions are thus continually used. IT GOES WITHOUT SAYING THEREFORE THAT A CLAIM FOR FRAUD IS NOT RELEASED UNLESS IT DOES SO ORIGINATE. There is nothing in section 63a within which it could be classified unless it can be traced back to a contract origin or foundation.

The debt under consideration in Crawford vs. Burke clearly had its origin, its foundation in a valid contract. That determined its character. It was a case where a broker who had for some time carried an account with his customer, bought and sold stocks for him upon margins, suddenly converted his customer's property to his own use. He accomplished his purpose and stilled his customer's suspicions for a time by false reports of his transactions. Nevertheless at the beginning, at the origin, at the foundation, there was simply a contract relation between the parties entirely free from any fraud. The fraudulent acts were committed during the performance of the contract, not before it began. The fraud was not the origin. It arose through a failure to carry out a lawful contract. The provable character of the debt being thus determined, the creditor could not change the character of his claim in this respect by suing upon such a tort instead of suing upon the contract at the "foundation." That is all that the Crawford case decided upon that point. In logical effect however, it is an authority for the proposition that *a claim for damages, for fraud and deceit is not released because not provable unless it does have its origin in a valid contract.* That is our proposition.

Our claim is the damages sustained by reason of

fraud and deceit. The allegations of the complaint (page 1-4) and the decision (page 6) show that certain grossly false and fraudulent representations were made with intent to deceive and that they did deceive the plaintiffs to their injury and damage. The measure of damages was the value of the goods which were parted with, not by any means the amount of the price specified in the attempted contract made after the fraud had been perpetrated. The claim is of the same nature as it would have been if a third person had made the same representations with the same wilfully fraudulent intent and with the same injurious result. No one would say then that the third person when sued for damages for a fraudulent misrepresentation of the financial ability of Russell & Birkett could claim that all was "founded" upon or originated in a contract simply because an attempted contract was made by reason of the undiscovered falsity of his statements. The mere fact that the person who made the false representation and the one who made the supposed contract is one and the same can make no difference in principle. The two things are as separate as though the persons were. This alleged contract had only one purpose, viz: to enable Birkett to get away with the goods, to help carry out the fraud. It was one of the tools of his trade.

Again, to hold as was done in the Crawford case that a contract does not lose its provable chracter because a tort is committed in the performance of it is a long way from the proposition that all torts are provable under the implied contract which always exists and that they must be proven as such. That would be equivalent to a decision that all claims are provable. The attempt to classify them as provable and not provable would be altogether usless. Both sections of the Act under consideration would be utterly senseless. The

proposition here is the converse of that in the Crawford case. If there a provable debt did not lose its provability by reason of a fraud committed after the contract was made because the fraud was not the "origin or foundation," is it not reasonable to assert here that the fraud which was the "foundation" remains a tort throughout and does not change its character into a provable debt because a voidable contract was subsequently made in reliance upon it?

POINT II.

The qualifying clause "while acting as an officer or in any fiduciary capacity" found in Sec. 17, Sub. 4, of the act, relates to the word "defalcation" only and not to any of the preceding words, "fraud, embezzlement, misappropration."

These debts being created by fraud would not therefore be discharged. We are aware that this proposition is directly in conflict with the argument contained in the first branch of the case of Crawford vs. Burke. We desire to urge the point though because we believe that we can demonstrate its correctness and because we regard the disputed argument as a mere dictum in no way essential to the decision of the case before the court at the time the words were uttered and not therefore entitled to rank as a deliberate judicial decision.

The claim in the Crawford case was in no way "created by fraud" because as we have shown in point I the debt was created by a valid contract before any fraud was committed. The debt was of the kind which was held not to be fraudulent within the meaning of the act of 1867.

Hinnequin vs. Clews, 111 U. S. 565.

There are many reasons why the proposition stated at the head of this point is the true one. We will try to state some of them and at the same time answer the argument in Crawford vs. Burke.

1. The location of the commas is some though not conclusive evidence of the meaning of the sentence. While we would agree with the proposition that a matter of punctuation must give way to what would otherwise be the plain and forcible meaning of the statute as a whole, still it is of some value to see what the punctuation means. It should be followed unless there is some thing else which overcomes it. We do not know that anyone disputes the grammatical construction except the learned Supreme Court of Viriginia, neverless it may be wise at the outset to refer to a few standard text books upon the subject. We have collected all we can find and their testimony is emphatic:

"No comma must be placed between restrictive adjuncts or clauses and that which they restrict, as, 'The eye of Providence is constantly upon us.' "

Quackenbos' Course of Composition and Rhetoric Sect. 137.

"A restrictive clause, however, must be set off, by a comma, when it refers to several antecedents which are themselves seperated by that point; as, 'There are many painters, poets, and statesmen, whom chance has rendered famous rather than merit.' ".

Id. page 110.

"A restrictive clause should be preceded by a comma, if several words come between the relative pronoun and its antecedent.

If the relative pronoun refers to each of a series of

nouns, it should be separated from the series by a comma. Example, 'He had hopes, fears, and longings, which his friends could not share.' "

Lockwood's Lessons in English.

"No comma is inserted before or after conjunctions * * * such as, and, or, nor, but, yet * * * * * when employed to connect words belonging to the same part of speech and in the same construction; or to connect two expressions which are in the same construction, and are used as if they belonged to the same part of speech. A comma should, however, be inserted before a conjunction * * * * when the word after the conjuction is followed by an expression which qualifies that word alone. If the conjunction is repeated before each word or expression in the series the comma is usually omitted where the words between which the conjunction stands are closely united in meaning, and is sometimes inserted when they are not so united. If the series is composed of several words unconnected by conjunctions, a comma is put after the last word, in order to indicate that all the words in the series bear the same relation to the succeeding part of the sentence. If the succeeding part of the sentence is connected with the last word of the series, but not with the preceding words, the comma is omitted."

Hill's Principles of Rhetoric, page 257.

"Relative clauses which are merely explanatory of the antecedent, or which present an additional thought, are separated from the context by a comma, or commas, but relative clauses which are restrictive, that is, which limit or determine the meaning of the antecedent, are not so separated." Id. 263.

The sentence standing alone would clearly mean there

that the restrictive clause limits the word "defalcation" only and that any debt created by fraud is within the list of exceptions.

2. The court says in the opinion "Unless these words relate back to all the preceding words of the subdivision * * * * * it results that the exception in Sub. 2 of all Judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by Sub. 4, whether judgments had been obtained or not."

Well, here is where we think the mistake occured. There was a very good reason for the insertion of that sub-division and a very necessary one too. That reason was not mentioned in the opinion, nor argued in the briefs of either counsel. It appears to us to be too important to have been intentionally omitted from discusstion. We refer to the situation which confronted Congress when it came to pass the Act of 1898. Let us examine that for a moment.

Under the bankruptcy act of 1867 debts created by fraud or arising out of fiduciary relations and in tort generally, were not dischargable. In the highest courts of many of the states, as well as in many of the United States Circuit Courts, it was held that, if, prior to the bankruptcy, a judgment was obtained for the fraud, then the fraud and tort became merged into the judgment, a contract of record, and was released as a contract indebtedness.

The following is a list of such decisions. It is not complete by any means but is sufficient to show that the situation which confronted Congress in 1898 was a real one. There were, of course, many other decisions of a contrary import, but we believe that they

were at least less numerous whether less logical or not.

Wolcott vs. Hodges, 81 Mass. 547.
Ellis vs. Hays, 28 Me. 385.
Crouch vs. Gridley, 6 Hill 250.
Kellogg vs. Schuyler, 2 Denio, 73.
Blake vs. Biglow, 5 Ga. 437.
Comstock vs. Grout, 17 Vt. 512.
In re. Adson Comstock, 22 Vt. 642.
Manning vs. Keyes, 9 R. I. 224,
In re Wiggers, 2 Bliss, 71
In re Samuel Book, 3 McLean 317.
Hays vs. Ford, 55 Ind. 52.

We cannot find that the question was ever passed upon in this court. Under these cases a most peculiar and most unjust situation was presented. A person might be guilty of the grossest fraud or commit any other tort. He could not be discharged from his liability therefor, unless perchance a judgment should be recovered thereon, adjudging and declaring that the liability alleged really existed. The very minute that it became judicially determined that the fraud existed, it could be wiped out. So long as it was uncertain, the creditor was protected by special provision of the law. As soon as the creditor began to enforce his right so specifically protected, he might lose it by a discharge in bankruptcy. It is submitted that this is just the result which ought not to be. Now it has often been held, and by many courts, that where a legislative body adopts a statute from another jurisdiction, where it has received judicial construction, the re-enactment is made with reference to that judicial construction.

McDonald vs. Hovey, 110, U. S. 628,
Beebe vs. Griffing, 14 N. Y. 243,
Bellegarde vs. Union Bag & Paper Co. 90 App. Div. 577.

Upon the same principle it must be seen that Congress, when it came to pass the act of 1898, did so with the full knowledge of the judicial construction which the act of 1867 had received. They saw the injustice and the absurdity as well. They protected the creditor who had a judgment by the addition of subdivision 2, Sec. 17, putting him on the same basis as the other creditor whose cause of action had not been adjulicated.

That would seem to present a very good and natural reason for the presence of Sub. 2. It is also somewhat further elucidated by reference to Sec. 63a (1) where we find a judgment for what ever cause to be a provable debt. That provision was not in the previous acts. If it be borne in mind that a liability for fraud, injuries to property, &c., changed its character as well as its form when reduced to judgment, Sub. 2 of Sec. 17, was necessary to remove the incongruity judicially imposed upon the act of 1867 to save a judgment of any kind. Its presence does not explain or modify any other subdivision of section 17.

3. We also find in Section 63a, in subdivision 5, further convincing corroberative evidence that Congress intended to correct this situation and had full knowledge and understanding of this subject. Under the act of 1867, it was held that if the creditor could get his claim into judgment between the time of the filing of the petition and the date of the discharge, then the judgment could not be discharged, arguing upon the same theory that the debt which existed when the peition was filed, was not discharged because it was merged into the judgment subsequently obtained, a new and different debt, and that the judgment was not discharged, neither was it provable against the estate, because it did not exist when the petition was

filed. This sounds like an absurdity, but it was specifically held by many of the highest courts of the country.

Bradford vs. Rice, 102 Mass. 472.
Holbrook vs. Foss, 27 Me. 441.
Pike vs. McDonald, 32 Me. 418.

See also discussion and contrary decision N. Y Court of Appeals.

Monroe vs. Upton, 50 N. Y. 593, 597.

This was specifically, almost catagorically met by the insertion of subdivision 5 of Section 63a.

4. Further evidence that Congress knew the trouble about judgments is found in other subdivisions of Sec. 63a upon the subject of costs incurred in litigation prior to the filing of a petition.

5. We do not apprehend that the illustration used on page 192 of the Crawford opinion will be held to be an adjudication upon the nature of the claims in this case. It was used simply as an illustration by the learned Justice who wrote the opinion. All that can be said is that it is not an appropriate one and was used apparently without any very great consideration of the subject of the illustration in all its details. The danger that a creditor will try to harass his debtor by an attempt to claim that his contract debt is in reality a cause of action for fraud, is slight indeed when it is considered how many and how great iniquities may be fostered by the construction of the statute now asked for by our opponent. The reluctance of all courts and all juries to convict of fraud in its nature criminal, is a practical protection to the honest, but unfortunate

debtor, which is full and complete. The reasons which we have pointed out are so strong and conclusive that they must overcome any suggestion that such a fear as this must have guided Congress in its action.

With this situation in mind, it leaves us free to consider subdivision 4, sec. 17. Subdivision 2 is fully accounted for and the reason of its existence fully explained. It is a perfectly just and equitable reason too. It need not compel any unnatural construction of subdivision 4 in order to create a harmonious law as a whole. In fact, it adds force to the natural construction of subdivision 4.

The construction claimed to have been given by this court would leave the situation so that a debtor could defeat a claim for fraud by a petition in bankruptcy if filed before judgment. This would leave the same injustice which Congress sought to remove, only it would place the defrauded creditor without a judgment in the place where he was under the old act, after he obtained the judgment. In practical effect this would be a worse situation than the old one. In the nature of things some time must elapse between the perpetration of the fraud and the recovery of judgment. Often, usually, the fraud is not discovered until insolvency. A petition in bankruptcy can always be filled without much delay and thus nullify the saving clause about judgments. There may be instances where such would not be the history of the affair, but we believe that they must be very few in number as compared with those which would take the other course. This present anomaly was not overlooked, although the last one was. The act of 1898 evidently tried to cure the former one by subdivision two, Sec. 17. Where that purpose is understood it leaves us free to read sub-division four, Sec. 17, according to its grammatical construction. It does not need

to be harmonized with anything else. Perfect harmony already exists.

It is respectfully submitted, therefore, that the judgment of the Court of Appeals of the State of New York, and the judgment of the Supreme Court of that state rendered upon its remittitur, should be reversed and the judgment of the trial court affirmed.

FRANK GIBBONS,
Counsel for Plaintiffs in Error,
5 Erie Co. Savings Bank Bldg,
Buffalo, N. Y.

Supreme Court of the United States.

No. 217.—October Term, 1906.

Thomas Tindle and Willis K. Jackson, Plaintiffs in Error, *vs.* Clarence T. Birkett. } In error to the Supreme Court of the State of New York.

[March 25, 1907.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was an action brought in 1899 to recover damages claimed to have been sustained in consequence of specified false and fraudulent representations made by the firm of which the defendant was survivor, by reason whereof plaintiffs alleged they were deceived into selling goods to defendant's firm, which they otherwise would not have done. The complaint contained three counts, setting up separate items of damages, namely, $349.30, $230.83 and $321.73 for goods sold, and judgment was demanded for the aggregate with interest on each item.

One of the defenses was that plaintiffs' claims were barred by a discharge in bankruptcy of defendant's firm, to which plaintiffs replied that they were not such as could be discharged in bankruptcy proceedings.

The New York Court of Appeals held that, according to the rulings of this court in *Crawford* v. *Burke*, 195 U. S. 176, the alleged indebtedness to plaintiffs was covered by the discharge, and directed plaintiffs' complaint to be dismissed. *Tindle* v. *Birkett*, 183 N. Y. 267.

This writ of error was then prosecuted, and plaintiffs' counsel contends that their debts were not provable debts and therefore not discharged, and that *Crawford* v. *Burke* might well be modified in view of certain suggestions deemed to be novel.

Sections 17 and 63*a* of the bankruptcy act of 1898 read as follows:

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

"Sec. 63. Debts which may be proved:

"(*a*.) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instru-

ment in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not . . . ; (4) founded upon an open account, or upon a contract expressed or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, . . ."

Counsel admit that the claims in question were all liquidated. By their nature and amount as well as by the form of the complaint they stand upon the contracts originally made. *Whiteside* v. *Brawley*, 152 Mass. 133, 134.

Crawford v. *Burke* was an action in trover instituted in the Circuit Court of Cook County, Illinois, by Burke against Crawford and Valentine, plaintiffs in error, to recover damages for the willful and fraudulent conversion of the interests of the plaintiff in certain shares of stock. There were ten counts in the declaration, five charging fraudulent conversion of that stock, and five, the obtaining of money from plaintiff in the way of margins by means of false and fraudulent representations. Defendants pleaded their discharge in bankruptcy, but were found guilty on all the counts, and judgment was entered against them, which was affirmed by the Appellate Court and by the Supreme Court of Illinois. This court held that plaintiff's claim was "provable under the bankruptcy act," that is, was "susceptible of being proved," and that it might have been proved under section 63*a* as "founded upon an open account or upon a contract express or implied," if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate. And that the words, in the fourth subdivision of section 17, "while acting as an officer, or in any fiduciary capacity," extended to "fraud, embezzlement, misappropriation" as well as "defalcation."

That case completely determines this as the New York Court of Appeals correctly held.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.